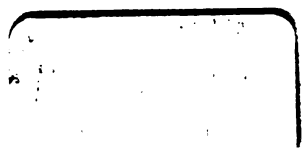

REFORM IN ADMINISTRATION OF JUSTICE

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CONTENTS

PART ONE—CIVIL

PART TWO—CRIMINAL

BOOK DEPARTMENT

NOTES

REVIEWS

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METHODS OF SELECTING AND RETIRING JUDGES IN A METROPOLITAN DISTRICT.[1]

By Albert M. Kales,

Of the Chicago Bar and Professor of Law, Northwestern University Law School.

Justice is not administered by an executive head planning how a large number of employees shall do clerical work or tend machines. Its ultimate source is in the operation of the mind of the judge upon certain facts presented to him in a judicial investigation. The power of the state to preserve order and settle the rights of parties is subject to be invoked in one way or another, according as the judge's mind reacts and operates. Clearly, therefore, the way in which the minds are selected for this important public duty and the way they are retired are of the first importance to the due administration of justice.

It may be that in some frontier or sparsely settled rural districts where extra-legal government does not exist, judges are in a degree really elected by the people. It may be that in such communities the electorate does actually pick out that one among the lawyers whom it wishes to act as judge.

There may be other communities which are well satisfied with the results obtained by special judicial elections at which the candidates are nominated by petition only and where the ballot is in form non-partisan. An analysis of conditions in such communities will usually show that extra-legal government by politocrats is very weak or non-existent and that the power of selecting and retiring judges really resides in the lawyers subject only to the approval of the electorate.

In a metropolitan district, however, where there is a large population and a governmental plan which reduces the most intelligent inhabitant to an extreme degree of political ignorance as a voter, and the establishment of extra-legal government by politocrats is

[1] This article will appear as chapter xvii in the author's book entitled *Unpopular Government in the United States*. University of Chicago Press. It is printed here by permission.

thus secured and fostered and becomes the real government, the judges, though the electorate regularly votes to install them in office, are not in fact elected at all. They are appointed. The appointing power is lodged with the politocrats of the extra-legal government. These men appoint the nominees. They do it openly and with a certain degree of responsibility under the convention system. They do it less openly and with less responsibility when primaries are held.

If you wish to test the soundness of these conclusions inquire your way to a judgeship in such a district or listen to the experiences of the men who have found their way to a judgeship or have tried to obtain the office and failed. In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief and through him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by politocrats.

The judges in a metropolitan district where the extra-legal government rules and where elections for judges are held, are not subject to a recall merely. They are subject to a progressive series of recalls. They are subject to recall by the politocrats who sit upon the governing board of the party organization. These may refuse a nomination at the time of an election. If the judge secures the nomination he may be recalled by a wing of the organization knifing him at the polls. He may be, and frequently is, recalled by reason of an upheaval upon national issues. In the case so rare that it is difficult for one with a considerable experience at the bar in a city like Chicago to remember it, a judge is actually recalled because of popular dissatisfaction with him. If there now be added the recall by popular vote at any time during the judge's term, we shall have presented the politocrats with a continuous hold upon the judge. Their power may at any time be used to initiate recall proceedings against him, and the individual without any real popular following will have but little chance against the tremendous power of a successful political organization. The recall of a judge by popular vote at any time will give a like opportunity to a particular faction of the political organization to attack a judge it does not

want. Such a recall will likewise give to a party which has a chance of sweeping all before it in a national election an opportunity to initiate a recall of some at least of the judges of the opposite political party. Of course, the recall election will also give the electorate at large an opportunity to retire a judge at once in the rare case where there is a real popular uprising against him. It does not take any great degree of intelligence to estimate whether such a recall by popular vote will be of greater advantage to the extra-legal government by politocrats or to the electorate at large.

The plain truth is that in a metropolitan district the selection of judges by some sort of appointing power cannot by any possibility be avoided. The position of a single judge out of as many as thirty and upward in a district containing an electorate of a hundred thousand and over is too hidden and obscure to enable any man who is willing to occupy the place to secure a popular following. The man who has a real hold upon a majority of so numerous an electorate will inevitably be led to a candidacy for governor of the state or senator of the United States, if not indeed for President of the United States. Another obstacle to the actual choice of judges by so numerous an electorate is that the determination of those fit to hold judicial office is unusually difficult. It would be a problem for a single individual who had an extensive personal knowledge of the candidates and had observed them closely for a considerable period in the practice of their profession. For all but the most exceptional judge in a metropolitan district the power which places him in office and retires him from office will be an appointing power, although there be in force the so-called popular election of judges. So long as extra-legal government by politocrats is the real government, that appointing power will be lodged in the politocrats who wield the power of that government.

There are many who sincerely believe that the ideal functioning of the electorate in a metropolitan district where the extra-legal government is strong may be restored if judges are elected only at special elections, where a judicial ballot is used which omits all designation of parties and upon which the names of candidates are placed by petition only, and the name of each candidate is rotated upon the ballot so that it will appear an equal number of times in every position. The object of such legislation is to restore a choice by the electorate by depriving the extra-legal government of its

predominant influence in judicial elections. The means adopted to deprive the extra-legal government of its influence is to take from it the use of the party circle and the party column. It may safely be predicted of such legislation that it will not cause judges to be the actual choice of the electorate, nor will it eliminate the influence of the politocrats in judicial elections.

The supposition is that if the influence of the politocrats can be eliminated the electorate will necessarily make a real choice. But the electorate does not fail to choose simply because the politocrat has taken that choice from it. On the contrary the politocrat rules because the electorate regularly goes to the polls too ignorant politically to make a choice of judges. That ignorance is due to the fact that the office of judge is inconspicuous and the determination of who are qualified for the office is unusually difficult even when an expert in possession of all the facts makes the choice. The proposed method of election does not in the least promise to eliminate the fundamental difficulty of the political ignorance of the electorate. If, therefore, it succeeded in eliminating the influence of the extra-legal government the question would still remain: who would select and retire the judges? There is no reason to believe that the electorate would make any real choice. Electors would be just as politically ignorant as they were before. They would be just as little fitted for making a choice as they were before. The elimination of extra-legal government does not give to the electorate at large the knowledge required to vote intelligently. Who, then, will select and retire the judges? The newspapers might have a larger influence, but they would probably be very far from exercising a controlling influence or uniting in such a way as to advise and direct the majority of the voters out of an electorate of several hundred thousand how to vote for a large number of judges. Special cliques would each be too small to control a choice and combinations would be too difficult to make. The basis of choice would, therefore, be utterly chaotic. There could be neither responsibility nor intelligence in the selection of judges. The results reached would depend upon chance or upon irresponsible and temporary combinations. With every lawyer allowed to put up his name by petition and chance largely governing the result, the prospect is hardly encouraging.

There is no reason to believe, however, that any such disorgan-

ized method of choice would be tolerated. The most potent single power in elections would end it. That power would be the extra-legal government. Its organization would be put to greater trouble in advising and directing the politically ignorant how to vote, because it would have been deprived of the party circle and party column. But the advice and direction could and would be given and followed. Each competitor for the power of the successful extra-legal government would have its slate of candidates. Each would prepare separate printed lists of its slate to be distributed at the polls and the voters would for the most part, as now, take the list of that organization he was loyal to or feared the most, and vote the names upon it no matter where they appeared upon the ballot. Thus the appointment and retirement of judges by the extra-legal government would, after perhaps a period of chaos and readjustment, again appear. Perhaps it would be even stronger as a result of reaction and deliverance from the chaotic conditions which it relieved.

It is impossible to escape the conclusion that in a metropolitan district with one hundred thousand voters and upward, the selection of judges by the electorate is practically impossible. It is equally certain that the judges in such a community must be selected by some appointing power. The real and only question is: what is the best method of appointment?

No method could be worse than that which we now employ. Appointment by the politocrats of the extra-legal government is so obscure, especially when effected by primaries, that they are under no responsibility whatever in naming judges and they have no interest whatever in the due administration of justice. Indeed, the situation is worse than that, for they may have positive reasons for wishing a type of man from whom they may expect certain courses of action which will actually be inimical to the efficient administration of justice, particularly in criminal causes; or they may be interested in filling judicial offices with those who have done more in the way of faithful service to the organization than in the way of practice in the courts.

From time to time, therefore, suggestions have come from members of the bar of ways and means for reducing the influence of the appointing power of the politocrats. It has been suggested that the bar association should be given power to place upon the official

ballot a bar association ticket upon which might appear candidates who had been nominated by any of the other political parties. This would give the candidates approved by the bar association and also by any other political party considerable advantage over those appearing in only one-party column. To that extent it would throw a greater influence into the hands of the lawyers. The question, however, has arisen whether this would result in a greater power in an unbiased bar association to select good judges, or in the lining up of lawyers in groups which were controlled by the leaders of the politocrats. The effort is frequently made to provide that all judges shall be elected at a special judicial election. This course may prevent the recall of judges because of an upheaval on national issues. It does not, however, interfere with the appointment of a nomination by the politocrats in the first instance. Even when the nominations are all by petition and the party circle eliminated and the names of candidates rotated upon the ballot, resort must still be had to the extra-legal government to escape absolute chaos and selection by mere chance.

Nothing of great value can be accomplished until it is recognized that the judges in a metropolitan district are certain to be appointed and that the only proper appointing power is one which is conspicuous, legal, subject directly to the electorate, and interested in and responsible for the due administration of justice.

This principle may be worked out in a variety of ways.

When the state executive as now constituted is given power to appoint directly, or to appoint indirectly by designating the nominees to be voted upon, the principle is worked out in one way. There are, no doubt, serious objections to either method of executive appointment. The governor of the state is, of course, in the midst of politics. He is also in the midst of a legislative program and the temptation is very strong to trade judicial places for the progress of administration measures in the legislature. Then the governor is not particularly responsible for the administration of justice, that being a matter of the judicial department rather than the executive. But this much can be affirmed, that any mode of appointment by the governor, since it is conspicuous and legal, and since the governor is directly subject to the electorate, carries with it a measure of responsibility which is not found where the appointment is secret and by the politocrats of the extra-legal government. Appointment

by the governor is better than the present misnamed plan of popular election.

It might be suggested that the power of appointment could be lodged in the highest appellate tribunal of the state, the members of which had a term of considerable length, but were subject to election. This again is, no doubt, open to objections. But again, it could not possibly be a worse method than the one now employed. Judges of such courts are more easily than governors made responsible for the due administration of justice. They would have stronger motives than the governor for appointing men who could best carry on the administration of justice. No body of men in the state has a better opportunity for determining the character and ability of lawyers, since they examine the work of lawyers continually with most minute care.

It has been suggested that vacancies in the judiciary should be filled by the appointment of the chief justice of the metropolitan district. He in turn should be chosen by the electorate of the district at fairly frequent intervals—viz., every four or six years—and in him should be vested large powers to oversee and direct the mode of organizing and handling the business of the court.[2]

[2] The following extract from the letter of Mr. Charles H. Hartshorne, of Jersey City, N. J., to the author dated November 4, 1912, explains the plan of administering the chancery jurisdiction in New Jersey: "The constitution of New Jersey provides that 'The court of chancery shall consist of a chancellor.' The chancellor is appointed by the governor with the approval of the senate, for a term of seven years. He is usually reappointed, though it is an open question whether this office is an exception to the custom that judicial officers of the superior courts shall be reappointed, regardless of their political affiliations, so long as they are capable of giving efficient service. That custom has resulted in our having upon the bench of the higher courts, judges who have served for very long periods—twenty-five years and upwards.

"A number of years ago, the work of the court of chancery having become too great for one judge to dispose of, a statute authorized the appointment by the chancellor alone (without confirmation by any other authority) of a vice-chancellor, as assistant. By further statutes, the number of these was increased to seven. The court now consists of a chancellor and seven vice-chancellors, who sit separately in different parts of the state. The vice-chancellors are appointed for seven-year terms. That bench is generally regarded as the strongest in the state and has given entire satisfaction to the bar and to the public.

"The vice-chancellors hear interlocutory motions in nearly all cases under a standing rule of the court, but they conduct trials and final hearings only

The objection which will at once be raised to this is that it presents an opportunity for the politocrats to obtain vast power by securing control of the chief justice. It is not difficult to demonstrate that the lodging of the appointing power in the hands of a responsible and conspicuous chief justice controlled by the politocrats would be much less inimical to the administration of justice than the appointment of judges in secret and without responsibility by the politocrats directly. The chief justice would, of course, only fill vacancies occurring during his short term. The guarantee to the public that such vacancies would be filled with fairly efficient men lies in the fact that enormous responsibility for the due administration of justice is focused upon a single man. Every complaint of inefficiency and impropriety comes home to him. Such a man cannot carry on the work of the court without the most efficient judges that he can possibly secure. This leads necessarily to the procuring as judges of members of the bar who have, in a successful practice in the courts, had a proper service test. Assuming that such a chief justice were the recognized deputy of the politocrats he would be driven by the necessities of the case, by the conspicuousness of his position, and the force of public opinion, to do his utmost to persuade the politocrats to permit him to appoint efficient men. That would produce an appointing power far better than the secret and utterly irresponsible method of direct appointment by the politocrats, which now exists. A much more desirable result than this, however, is to be expected. Such a chief justice would be so important and conspicuous an officer and his power so great, that in his nomination and election the desires of the electorate as a whole

upon an order of reference from the chancellor. After trial they write the opinion of the court, which is usually reported, and advise the decree, which is then signed by the chancellor. No appeal lies from their decree to the chancellor, but all such decrees may be appealed directly to the court of errors and appeals.

"Theoretically, the vice-chancellors are merely referees who report and advise the chancellor, the decree being made by him upon their report. In actual practice however, they are members of the court of chancery, in fact (but not in form) making the final decree of that court.

"The system has worked very satisfactorily in respect to the character and attainments of the members of that bench, but the work of the court in populous cities is a good deal in arrear. This is due to the volume of business having outgrown the number of vice-chancellors."

would have to be much more fully considered than is the case where the politocrats appoint to a nomination and seek the election of an obscure member of a bench composed of thirty members and upward.

All fear of the chief justice having too much power and falling too much under the influence of the politocrats and extra-legal government may be dissipated by making adequate provision for his retirement. The chief justice would, of course, be subject to impeachment. He might also be retired by a legislative recall by a vote of three-fourths of the members of the legislature after an opportunity for defense and for cause entered upon the journals,[3] or by the governor upon an address of both houses of the legislature.[4] The fact that the chief justice held office only for a short term would in fact subject him to a recall by popular vote at the end of each period. To this might, with perfect propriety, be added the recall of the chief justice and election of his successor by popular vote during the regular term. Surely such safeguards are ample to protect the electorate from any abuse of the appointing power conferred upon the chief justice.

A chief justice who is retired at the end of his term by failure to be reëlected should, however, have the right, if he so chooses, to remain one of the judges of the court upon the same footing as an appointed judge and subject to assignment to duty by his successor. This is proper because the election goes only to the matter of his political position as the chief justice exercising an appointing power and administrative powers with respect to the organization of the court and the way its business is handled. The electorate has nothing to do with his fitness to decide litigated causes. Furthermore, the fact that a failure to be reëlected will not send the chief justice back to the practice of the law, which he has given up, will insure greater independence on his part while holding office as chief justice. It will also be an act of fairness to him, since a profession once given up during six or eight years for a place upon the bench is difficult and frequently impossible to recover. In addition to this it is best for the administration of justice itself that ex-chief justices who cannot regain their position in practice and are pitiful reminders of former greatness, should not be left derelicts at the bar. But if

[3] Illinois constitution 1870, art. vi, sec. 30.

[4] Massachusetts constitution, ch. iii, art. 1; 38 and 39 Vict. ch. 77 (Jud. Act 1875), sec. 5.

a chief justice upon failure to be reëlected chooses to take his place as a judge in the court, he should not be permitted again to be a candidate for chief justice. It will not do to have in the court the rival of the sitting chief justice with a motive for making trouble.

The principal objections to the appointment of judges have been that they necessarily hold for life and become arbitrary and exercise judicial power in a manner distasteful to the lawyers, their clients and a majority of the electorate. It will usually be found on analysis that the objectionable exercise of judicial power by an appointed judge is due to the fact that appointment means a life tenure. Hence the real objection to the appointment of judges as such is that when appointed they have held office for life. The entire objection, therefore, to appointment may be met by limiting the tenure of the appointed judge and by a variety of provisions for his retirement. He would, of course, be subject to impeachment. He might very well in addition be subject to some mode of legislative recall such as was proposed for the chief justice. His term may be limited to five years or seven years, thus requiring a retirement at the end of each period unless a reappointment is made. The judge appointed by the chief justice may even be subject to recall by popular vote according to one or the other, or both, of two plans. The appointment might be for a probationary period—say three years—at the end of which time the judge must submit at a popular election to a vote on the question as to whether the place which he holds shall be declared vacant. This is not a vote which puts anyone else in the judge's place, but a vote which can at most only leave the place to be filled by the appointing power. Such a plan must necessarily promote the security of the judge's tenure if at the popular election his office be not declared vacant. After surviving such a probationary period his appointment should continue for—let us say—six or nine years. At the end of that time the question might again be submitted as to whether his place should be declared vacant. If thought necessary further to protect the electorate from the bogey of an appointed judge, he might be subject to recall at any time upon the petition of a percentage of the electorate. But this recall, like the other, should be only upon the question of whether the judge's place should be declared vacant, leaving the vacancy, if created, to be filled by the appointing power. The danger in the existence of both these plans of popular recall is that they may be used with more effect by any extra-legal govern-

ment of politocrats than by the electorate at large. It is highly improbable that the electorate would find it necessary or advisable to use either mode of recall. The presence of either mode would, therefore, furnish a means whereby an influence of the politocrats upon the judiciary could be continuously maintained.

It is, however, a grave mistake to suppose that judges exercise their judicial power in a distasteful and arbitrary manner merely because they hold for life or during good behavior. An arbitrary or disagreeable course of action by a judge arises principally from the fact that he is subject to no authority which can receive complaints against him and act upon those complaints by way of private or public criticism and correction of the judge. The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of fellow judges who hold a position of superior power and authority and to whom complaints as to the conduct of judges may be brought and who may investigate those complaints and exercise a corrective influence. When a considerable number of judges in a metropolitan district are provided with a chief justice and organized for the efficient handling of a great volume of business, the means of securing the exercise of a corrective influence over their conduct at once appears. Such a court must be organized into divisions for the purpose of handling specialized classes of litigation. In a metropolitan district like Chicago there should be an appellate division with from six to nine judges sitting in groups of three, a chancery division of six judges with a corps of masters, a probate and family relations division with at least four judges and a corps of masters and assistants, a common law division with fifteen to eighteen judges and a corps of masters, a municipal-court division with thirty-three judges. The chief justice should be the presiding justice of the appellate division and each of the other divisions should have a presiding justice with large powers over the way in which the work of each division is handled. The chief justice and the presiding justices of divisions should form a judicial council or executive committee, with considerable powers over the way the court as a whole was run. To such a judicial council there should be committed the power to remove from office any judge, other than the chief justice, and to reprove, either privately or publicly, or transfer any such judge to some other division of the court for inefficiency, incompetency, neglect of duty, lack of judicial temperament, or conduct unbecoming a gentleman

and a judge, for the good of the service, or to promote its efficiency. The power of removal by the council should only be exercised where written charges had been filed and after an opportunity has been given to the judge to be heard in his own defense.

The existence of a judicial council composed of the chief justice and the presiding justices of the different divisions of the court, each one responsible for the way in which the work of his division is handled, suggests also a practicable way in which to stimulate efficiency at the bar, provide a service test for candidates for places on the bench, and subject the appointing power of the chief justice to a slight but reasonable control. The judicial council should be given power to appoint upon an eligible list for each division of the court twice as many members of the bar as there are judges in the division. The chief justice in appointing judges to a place in any division of the court should be required to select from this eligible list on the occasion of every other appointment at least. The operation of such a plan would be to place in the hands of the presiding judges of divisions an express authority to suggest what members of the bar practicing before their divisions respectively would make satisfactory judges for each division. It would also operate to stimulate the efforts of lawyers and promote competition to secure places upon such eligible lists by specialization in practice before particular divisions. This would develop an expertness in the handling of litigation which does not now exist on the part of any considerable number of the bar.

We may then conclude that in a metropolitan district with a hundred thousand electors and upward judges cannot be elected. They must be appointed. If an election is attempted it is a failure and appointment results. The worst method of appointment is the secret and irresponsible appointment by politocrats. The most promising is the conspicuous and legal appointment by a chief justice elected at large in the district at frequent intervals. Every objection to such a plan and every prejudice against it may be met by provisions for the retirement of the chief justice and his appointees by impeachment, by legislative and popular recalls and by the power of the judicial council to discipline and remove any judge other than the chief justice. It is even possible under such a plan to promote efficiency by securing an eligible list of men whose experience in practice under the eyes of the judges insures excellence in appointment.

THE RECALL OF DECISIONS

By Moorfield Storey,

Boston, Mass.

The United States and each state in the Union is governed by a written constitution, which limits the powers of the officers who conduct the government and defines the rights of the citizen. The Constitution of the United States also draws the line between the powers of the federal government and the powers of the several states. It is inevitable that questions should arise between state and nation, between the states and their citizens, and between individuals as to the construction of these constitutions, and some man or body of men must decide these questions or our system breaks down. Hitherto they have been decided by the courts, but it is now proposed that from their decisions an appeal should be taken to the people. Is this a reasonable proposal?

It will be conceded generally that the law which controls us all should be certain so that every man can rely on it and govern himself accordingly; that courts should be no respecters of persons but should treat rich and poor, popular and unpopular alike, and that in order to secure such courts the judges should be wise, upright, courageous and impartial. No lover of justice can dispute any of these propositions.

It must also be remembered that constitutions are laws adopted by the people as a whole to define the power of their rulers and to protect and secure the rights of minorities and individuals. Power can always guard itself and needs no protection, whether it rests on tradition, on military force, or on mere numbers. It is the weak and not the strong, the few and not the many who are in danger. The successive victories of liberty in the long contest against tyranny have always resulted in securing for the citizen some constitutional safeguard like Magna Charta, the Act of Settlement, the various provisions which are found in all our written constitutions, or the amendments adopted after the Civil War. The words which secure religious liberty, the right of petition, or the freedom of the press are not necessary to protect the man who agrees with the majority

of his neighbors, but him who disagrees—him who is a Catholic in a Protestant country, him who would petition for the abolition of slavery when its friends control the government, him who would preach some doctrine which the majority disapproves. As Mr. Hornblower has put it, "Civilization consists in subordinating the wishes of the majority to the rights of the minority." The protection which our constitutions give to the life, liberty and property of every citizen is a protection against abuse by the officers chosen by a majority of his fellow-citizens, and there are few of us, whether laborers or capitalists, who would feel safe were these constitutional safeguards taken from us. In a word a constitution is a law adopted by the people to protect each citizen against oppression by a majority of the people themselves or by the officers which this majority chooses. This is its main purpose.

These propositions are fundamental, and unless we would do away with constitutions altogether and make the majority of the moment omnipotent in dealing with our lives and property, any discussion must proceed upon this basis.

The recall of decisions may be limited to those decisions which involve a construction of the constitution, or it may include those which lay down a legal rule that concerns the public generally, or it may extend to all decisions. If the principle is once established, no one can say to what class of decisions it will not be extended. Its more intelligent advocates insist that it will be used only to amend state constitutions by reversing decisions which hold particular statutes inconsistent with such constitutions, but they cannot control the movement thus inaugurated. It is easy to set a fire which the incendiary cannot extinguish.

Why should we adopt this new political nostrum? We have gone on for a century and a third under the existing system. It has carried us safely through the formative period when the government was young, through periods of financial disaster, through the great Civil War and the critical days of reconstruction, through fair weather and foul in a way which has excited the admiration of mankind, and we have all been proud of it as the most successful instance of self-government on a great scale and under most diverse conditions in the history of mankind. Why should we change? What is the ground of complaint? If our opponents are driven to precise statement it will be found that the system as a rule has worked to the

entire satisfaction of the people, but that in a few states and in a few cases courts have made decisions which are not palatable to these advocates of change. This may be admitted, for all men are fallible, and under any system it is impossible to satisfy everybody. But shall we for a few mistakes destroy a system which as a rule works well?

Let us go a little further. The recall of decisions, at first limited by its author to the recall of decisions made by state judges in construing state constitutions, has now been given a wider scope and is advocated by its friends on the ground that all courts defeat the will of the people when they declare an act unconstitutional, and that it is dangerous to give a few men so great a power. These critics work themselves into a frenzy over the danger to free institutions arising from the courts, and as one writer expresses it:

> If we the American people are not willing to let the federal judiciary prove to be our Frankenstein monster, uncontrollable and destructive, we must uphold and act upon the doctrine of Thomas Jefferson, the great American whose democracy was pure and undefiled. He wrote to Jarvis: "It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions. . . . . The constitution has erected no such single tribunal. . . . . It has made all the departments co-equal and co-sovereign with themselves."

This may seem like a convincing statement to some, but let us analyze it and see if there is really danger that the federal judiciary will prove "a Frankenstein monster, uncontrollable and destructive."

No one will doubt that a constitution, in every case which we need consider, imposes some limits on the powers of the legislature and the executive. There are some things which neither can do. For example the legislature cannot interfere with the freedom of religious worship, and the governor cannot order a man killed without a trial. When we approach the border line questions arise which it may be difficult to decide. If we concede that the legislature may determine for itself all questions as to its own power, and that the passage of an act is a decision that it has the power to pass it, there ceases to be any limitation on the legislative power. If the governor may insist that he has power to do whatever he chooses to do, and that no one can question it, the constitutional limits on his power lose all their force. These propositions admit of no dispute. There is no alternative save the decision of such questions by the court.

Let us next ask what the judges do when they decide an act unconstitutional. They do not issue a decree when the law is passed setting it aside and staying its execution. Unless the question is raised in some litigation they express no opinion, but when a case comes before them in which one party claims a right under some statute, and the other says that the statute was one which the legislature had no power to pass, they deal with the issue thus raised. It being conceded, as it must be, that the legislature of the day has no power save that which the people gave it by the constitution, the question before the court is, "What is the people's will?" Their will as expressed in the constitution must prevail for that is the fundamental law, and the court in interpreting the constitution and applying it to the statute, so far from defeating the people's will, is endeavoring to carry it out. In so doing it is the court, not the legislature, which best represents the people.

I cannot state the proposition as well as Chief Justice Marshall stated it in Marbury *vs.* Madison:

> If two laws conflict with each other the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. . . . . Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void is, yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that these limits may be passed at pleasure.

It is always certain that the losing party and some others will quarrel with the decision, and it is possible that the interpretation which the court gives to the words of the constitution may not be approved by the majority of the people. They may say, "If that is what the constitution means, we do not like it." Is the court an uncontrollable monster from whose decree there is no relief? On the contrary the people have only to change the constitution by amend-

ment, as they have done several times recently with the Constitution of the United States, and are constantly doing with the constitutions of the states. The people can wipe out the whole constitution, can adopt socialism or even anarchy, can obliterate all rights of property, all freedom of speech if they wish, and the courts are of all men the least able to prevent it. The courts tell the people what their law means, and the people if they are dissatisfied have full power to make a new law which will satisfy them better.

Let us take another step and examine Jefferson's theory that each department of government may construe the constitution for itself, and its decision be binding. Does anyone really think that the quiet and generally elderly gentlemen who compose our courts, and who have no power to enforce their decrees save as the executive aids them, are more dangerous Frankensteins than an uncontrolled President, or a lawless Congress would be? Are three Frankensteins safer than one? The judiciary is notoriously the weakest department of our government. Its power comes from its wisdom and its character, and is purely moral. Not so with the executive and the legislative branches which control the purse and the sword.

Questions of constitutional interpretation must arise between Congress and the President, as in the time of Andrew Johnson. More conflicts may come in the future, and if each can interpret the Constitution finally, there is no way out of the conflict. It is not safe to let a headstrong president define his own powers at pleasure, or a legislative majority in times of popular excitement legislate at will. Some one must decide such questions, and the only possible arbitrators are the courts. If they are shorn of their power, there is no constitutional limit upon executive or legislative power—in short there is no constitution. If they make law which the people do not like, the people can change it after due deliberation. The ultimate power is with them. This is democracy pure and simple.

Jefferson's three Frankensteins, or even one of them if the President is the one, may well mean civil war as might have been the case when the Hayes-Tilden controversy arose. The Frankenstein that can send the troops and ships of the United States to prevent Colombia from asserting its rights in its own territory, or can send soldiers to quell a riot in any city, is a far more dangerous Frankenstein than any court in the United States. Shall we, with this in view, abandon the ways which we and our fathers before us have trodden so long in safety?

But it is conceded by the advocates of the recall that the people have the power to amend the constitution and so change any interpretation of its provisions by the courts, but they say it is a cumbrous process, that it is slow in its operation, that its outcome is uncertain, and that it is difficult to draw an amendment which is entirely satisfactory, a difficulty encountered in New York in the effort to change the constitution so as to impose on employers a liability for accidents to employees.

If the process is slow, it is because the founders of this government wisely decided that it should not be too easy for a popular majority to change the fundamental law which regulates the powers of the governor and the rights of the governed. There is no one who has not had occasion to realize the wisdom of "sleeping on" a proposition before acting. Our system makes the people "sleep on" a proposed amendment before adopting it, and this spells safety. There are few if any constitutional changes which cannot safely wait the sober second thought of the voters, and if in any state the process of amending the constitution is bad, the process itself can be changed by amendment.

It is said that of many amendments proposed only few have been adopted. The fault is not with the process of amendment but with the amendments themselves. There has been no difficulty in carrying amendments which the people wanted. The difficulty has been with those that the people did not want, and that this difficulty exists is an argument in favor of the present method. As for the difficulty in drawing an amendment, what stronger argument can we have against the proposed change? If skilful men with ample time at their disposal cannot express in writing what they mean, is it not clear that their minds are not in accord and that they do not know what they want, or perhaps that they recoil from the amendment when they see it in black and white? If we cannot reduce the law to a written statement, where shall we be left by a popular election recalling a decision, and what will the law then be? It is impossible to foresee the extent of the resulting confusion.

The arguments against the recall of decisions are numerous. In the first place how would the process affect the certainty of the law, which is most important, as was stated at the beginning of this article? Today we find the law in the text of the constitution and the statute. We are aided in its interpretation by the history of

the provisions in question, and by the decisions of eminent and able judges and the precedents which their labors have established, and with these to help him the lawyer who is called upon to advise a client as to his right can with some confidence tell him what they are. If the recall of decisions is adopted he must say, "This in my judgment is the law as the court will lay it down, but after its decision the other side may start an agitation for a recall and no one can tell what the result of a popular election will be." The client will be as much at sea as would be the patient if he found that the remedies prescribed by his doctor were subject to be changed, if the public after hearing various quacks decided by a majority vote that the diagnosis of his doctor was wrong.

Let us pursue the client's difficulties a little further, and suppose he is sued. Shall he settle the claim or not? His lawyer must say that "while in the courts you will win, you must incur the expense of defending yourself there, and afterwards of conducting a popular campaign before you are safe. What that expense, or what the result of the election will be, who can tell?" If it be said that the recall is not to affect the judgment so far as the rights of the parties to the case are concerned, what is the position of the losing party, bound by a judgment which as to the public and all other parties is held by the people to be wrong? There is then one law for the unhappy man who raised the question and incurred the expense, and another law for all his fellow-citizens. Suppose the amount in a case is small but the principle involved affects a great many: must the persons interested form a party and raise a campaign fund to sustain a decision or reverse it at the polls? The imagination fails to grasp all the possibilities and uncertainties of law made in such a way.

It is conceded also that the law should be no respecter of persons. Suppose a constitutional fight is claimed by a Rockefeller in a dispute with some laborer, can we be sure that the people will not decide against Rockefeller's contention because he is rich, and can afford to lose his case? This is the reasoning which juries often use in deciding suits for personal injury, and their logical processes are those of the community at large. Suppose next year a poor man claims the same constitutional right against a rich neighbor, will not the poor man be likely to prevail for the same reason, and then which election makes the constitution? Is one popular election to settle rights for all time, or may it be overruled by the same voters or their descendants at another election?

Again the courts in deciding often leave questions open for future consideration, and it is doubtful how far their decision is intended to go. Will not the same or greater doubts be left by popular elections? Our opponents say that the opinions of the court are "only literature, impressive, helpful, more or less persuasive, but not of themselves law." Yet it must be confessed that they state the rules which the courts will follow in like cases; that they tell us what the law is, and guide us in other cases. What shall take their place when a decision is recalled? Shall we interpret the result by the speeches of irresponsible orators on the stump, or by appeals made in campaign documents? What a vista of hopeless confusion and uncertainty the suggestion opens!

Moreover when the question is presented to the voters whether they wish a particular law to stand although it violates the constitution, they are really asked whether they want to override the constitution in this case. It is only an abuse of terms to call it amending the constitution, for it is not suggested that the provision of the constitution violated in that case is to be treated as absolutely repealed. To illustrate my meaning, let me call attention to the constitutional rule that no man can be deprived of life, liberty or property save by due process of law. When a number of lawyers were trying to frame an amendment to the constitution of New York which should make possible an employer's liability law of an extreme character, and were contemplating their completed work, one said, "This does not seem to me entirely satisfactory." "No wonder," replied another, "what we have done in substance is to make the constitution provide that no man shall be deprived of his property save by due process of law except employers of labor." The story may be true or false, but it is clear that while no one would probably advocate the repeal of the general provision, he might very well support a particular law without recognizing that it violated that provision. Laborers might be willing to deprive their employers of rights which they would insist on preserving for themselves, just as the labor unions object to any combinations of capitalists that may tend to monopolize trade or prevent competition, while they strenuously insist that they shall have the right to form combinations against their employers with the same object.

When the constitution is amended under the present system each voter has a chance to consider how he would like the new rule

in his own case, and to forecast the contingencies to which it might apply, knowing that he cannot make a rule which will affect others without its affecting him also. But in deciding whether to recall the decision in favor of a rich man he will not realize that he is making law for himself, nor if the election only validates a particular statute will it perhaps affect him. If the recall is adopted, there will be no settled rule which the majority of voters may not set aside in a given case at pleasure.

Again if the majority can recall a decision and so by a majority vote amend the constitution, where is the protection now afforded minorities and individuals? The very object of the constitution is to restrain the power of the majority and to protect the rights of the individual against its tyranny. This object is defeated if a majority of the voters is given the power to invade these rights at pleasure. It is not necessary to speak of the feelings aroused by differences of religion, or wealth, or the antagonism between labor and capital, though all are very easily aroused. Consider only the effect of race prejudice, today the most dangerous influence at work in our midst. Only a few years ago I heard an eminent Hebrew in New York say that the lives and property of his race were safe nowhere save in England and the United States. The Dreyfus case was then shaking the government of France, and the expulsion of the Jews from Russia and their treatment in other countries were fresh in men's minds. It is possible that a similar feeling might be raised against them in parts of the United States, for we are of flesh and blood in no way different from other men, and in that case how safe would they be with no constitutional protection? Ten millions of our fellow-citizens, our equals before the law in every respect, are now suffering outrages and indignities of all kinds in every part of the country because their skins are darker than our own. They are denied the right to vote, they are denied in some places the right to live where other citizens may live, their lives are taken without due process of law. The constitution affords them their only protection. Can their rights safely be left to be dealt with as pleases a majority of their fellow-citizens in many states? To ask the question is to answer it.

Lastly we may be sure that while men are men disputes between them will constantly arise, and somehow, by somebody, they must be decided. As civilization has advanced, the old-fashioned ways of

settling those questions by might, by wager of battle, or various ordeals have been abandoned, and instead it is agreed that the best way of settling all controversies is by submitting them to impartial men, who after hearing the parties shall decide what is right. Even in the international field, enlightened men of all nations are agreed that the settlement of questions by the majority on the battlefield must cease, and that such disputes must be adjusted by The Hague tribunal or some like body of trained jurists. It would be absurd to propose that an election should be held in which the contending nations should vote and a majority decide, for that would make Russia supreme in Europe and the smaller nations would be placed at the mercy of their larger neighbors. What is so manifestly absurd as a method of settling questions between nations is hardly less so if applied to disputes between individuals. It is clear that in an international controversy each voter would stand by his own country, and therefore an election would be a farce. Is it not equally clear that if the constitutional or other question involved in a decision were of such popular interest as to suggest the recall, the voters in deciding it would stand by their own class, their own color, their own party, their own locality, just as Russians would stand by Russia and Frenchmen by France? That if the election for example turned on a decision as to the respective rights of labor and capital, or any like question on which feeling was strongly aroused, the result would be influenced by prejudice and sympathy, and that the feeling not the reason of the voters would determine the result? So far from having their rights fixed by an impartial tribunal, the parties would be sent from that tribunal to fight out their differences at the polls, and the strong side, not necessarily by any means the right side, would prevail. It is not right, but might which would decide the contest, and thus in cases of the greatest importance to the public our whole method of deciding controversies by disinterested men would be abandoned, and instead, the result of a contest between the parties, in which the most numerous would win, would be registered as law. We struggle to get juries in all important cases made up of men who can have no prejudice or opinion on the questions involved. If the recall prevails the tribunals which make our law will be governed by prejudice. Can anything more inconsistent with the orderly administration of justice or anything more contrary to all civilized procedure be imagined?

In a word we labor to secure wise, courageous and impartial judges trained for their work by years of study and experience to decide the disputes which arise among men, and it is proposed that from the decisions of such men an appeal shall lie to the people, an appeal from knowledge to ignorance, from impartiality to prejudice, from ripened experience to inexperience, from the serene atmosphere of the courtroom to the declamation and passion, the noise and the dust of the hustings.

But it may be said that in a different way the people can accomplish the same result since they can amend the constitution. That is true and I would not take away or fetter this absolute power. But its exercise is now regulated in such a manner as to insure deliberation, and as far as possible to present a general rule and not a particular case for consideration. Even in courts "hard cases make shipwreck of the law," and this danger would be increased a hundred fold if the people were given power to decide in each case whether or not to uphold the constitution. There is power enough now, and it is properly guarded. Let well alone.

Nor is the process of amendment slow or difficult. Between 1880 and 1911 the people of Massachusetts have adopted twelve amendments to the constitution of the state. This necessitates the adoption of the amendment by two successive legislatures and its ratification by vote of the people, but in no case has the process occupied two years. It may be doubted whether amendment by the recall of decisions would be more expeditious. It certainly ought not to be, and if other states have more cumbrous methods, they can adopt the Massachusetts rule. To be sure in Massachusetts elections are annual, while in most states the legislatures are chosen biennially. The annual session was abandoned because the people did not like to have the legislature so often in session, in fact did not trust their representatives thoroughly. The biennial session may delay the process, but it is strange that communities which in this way have shown their distrust of legislative action should now assume that if a law which such a legislature has passed is held unconstitutional, the people's will is defeated. Is the legislature, that cannot be trusted to meet every year lest it abuse its power, so infallible an interpreter of the people's will that our whole constitutional system must be changed and our constitution in fact abolished in order to give its laws more immediate effect? If skilful draftsmen cannot

write an amendment to the constitution which satisfies them, will the constitution be amended better by the loose language of a statute drawn as most of our statutes are? Such will not be the judgment of intelligent men.

Senator Root has stated the question admirably in the following words:

> We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. . . . . A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever in any particular case it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect.

In a word it abandons our whole theory of constitutional government. It is difficult to believe that the people of the United States are ready yet to adopt this suicidal policy.

CONSTITUTIONAL GROWTH THROUGH RECALL OF DECISIONS

By Donald R. Richberg,

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Seldom has a political theory received so little unprejudiced consideration as the "recall of decisions." Bench and bar and the lay public have confused the idea with the recall of judges; have repeated catch phrases, such as—"the appeal from the umpire to the bleachers;" and largely overlooked the substance of the proposal—an improved method only, for the exercise of a fundamental power reserved to the people, to make, to amend, and to interpret their constitutions.

The lack of a clear understanding of the proposal, rather than any vicious intention to misrepresent, is responsible for many unfair arguments against it. Lawyers, who should be better informed, repeat the stale misstatements of their professional brethren; and laymen, who have acquired a wholesome distrust of the advice of the bar, may be thereby unduly prejudiced in favor of the proposition.

It is possible that a presentation of the idea in words of one syllable may serve a double purpose in helping to clarify the real issue both for members of the bar and for the interested public. In order to simplify the exposition so far as possible, the present consideration will deal only with the recall of a limited class of "police power" decisions.

Why and When Necessary

In a certain class of important cases there may be, under the constitution of every state in the Union, a conflict of authority between the legislature and the courts.

Under the constitution the legislature of a state claims the power to pass a certain law—a law not prohibited by any definite words in the constitution.

Under the constitution the supreme court of the state claims the power to declare that particular law void.

Who is to decide between these two claims of power?

The court may decide the case before it, but the court cannot decide the conflict in opinion between itself and the legislature.

Controversy has arisen between two arms of government of equal authority. No one can be assured whether the will of the people has been thwarted or upheld. A prudent regard for maintaining respect for the law and retaining confidence in the institutions of government requires a final adjudication of the controversy, which shall assure the supremacy of the will of the majority, as speedily as is consistent with intelligent consideration.

Clearly the only power superior to both the courts and the legislature lies in the people who made the constitutions which give the two conflicting bodies their authority.

Clearly the people can only exercise their power directly through the ballot box.

The truth of these conclusions is not to be disputed by any student of constitutional law or political science.

Controversy arises only over the question: How shall the people exercise their power to determine what the law shall be, when their representatives in the legislature and on the bench disagree?

The established method has been by amendment of the constitution.

The proposal made by Theodore Roosevelt before the Ohio Constitutional Convention was that in a certain limited class of cases a better method would be the "recall of decisions." This he has more recently described as the "review by the people of judge-made laws."

Neither of these terms, each being a definition of procedure, quite describes the purpose of the popular vote, which is—the decision by the people of a controversy between their courts and their legislature.

The courts are the guardians of the people's fundamental law —the constitutions. The legislatures are the makers of the people's ever-changing law—the statutes. Both the preservation of the principles of the fundamental law and the right to develop those principles in the changing statutes are essential to our form of government. In harmony they express the will of democracy. In conflict the law of the land becomes confused and uncertain.

In order to measure fairly the value of the new method for popular decision of such conflicts, one must have in mind the merits and demerits of the old method which it is sought to improve.

Why Constitutional Amendment is Inadequate

In the first place the point of the proposal can be kept most clearly in mind by considering only the application of the "recall of decisions" to cases where the extent of the police power is the decisive issue.

The Progressive national platform has limited this doctrine and expressed the party position in the following language:

> That when an act, passed under the police power of the state, is held unconstitutional under the state constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become a law, notwithstanding such decision.

To understand the reason for this limitation one must know what the "police power" is—a subject quite vague in the minds of laymen and none too clearly understood by many lawyers.

What the Police Power Is

When a people write a constitution they create the machinery of government. They establish a legislature to make new laws and to change old laws, in order to express the developing ideals of business and social morality. They designate and provide for the election of executives to administer these laws. Lastly they establish courts to decide controversies over private rights and over the powers and duties of public officers. A constitution gives certain powers to public servants and prohibits certain other powers and therefore contains both grants of authority and limitations of authority.

When the supreme court of a state upholds or denies the power of the legislature under the state constitution to pass a law, the decision will fall into one of two classes. It will be based on either:

(1) Definite power granted or denied in specific words
or
(2) Broad power granted or denied in general terms

} in the state constitution.

The Present Consideration of the Recall of Decisions Deals Only with the Second Class of Cases

A few examples of the type of constitutional provisions involved in the first class may be taken from the Constitution of the United States:

Power definitely granted.	The Congress shall have power . . . .
	To lay and collect taxes. . . . .
	To coin money. . . . .
	To establish Post Offices and Post Roads.
Power definitely prohibited.	No bill of attainder or ex post facto law shall be passed.
	Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

When a legislature exercises such a power definitely granted or prohibited and the supreme court interprets such definite language, there is no conflict of authority. If there is difference of opinion, even the legislators themselves will yield to the greater wisdom of the court in interpreting constitutional or statutory language. Nor would the average citizen care to act as a court of appeal.

In such a case the supreme court explains and enforces the constitution. If the language of the constitution no longer represents the will of the people the appropriate action to be taken by the people is to amend the constitution by altering its language.

But an entirely different situation is presented when constitutional questions arise in that twilight zone between broad powers granted and broad powers denied, in general language.

The most shadowy realm of all is between two provisions here quoted from the national Constitution but found in substance in practically all state constitutions:

Power broadly granted.	The Congress shall have power . . . .
	To provide for the common defense and general welfare. . . . .
	To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.
Power broadly prohibited	No person shall be deprived of life, liberty or property, without due process of law.

Between the above quoted granted power and prohibited power lies the great twilight zone of the "police power"—the power of the state to pass and enforce laws which are neither specifically authorized nor prohibited in the state constitution, but which are in aid of the general welfare.

If, for example, the state supreme court believes that a ten-hour law for women is necessary for the general welfare that law will be upheld as a proper exercise of the "police power."

If, however the state supreme court does not believe that such a law is necessary for the general welfare, the law will be held unconstitutional—as depriving women of "liberty" (the right to sell their labor for more than ten hours) without "due process of law."

The difference therefore between laws which are constitutional and unconstitutional, between what is "due process of law" and what is not, in such cases involving the "police power" does not depend upon any language in the constitution. These cases are decided solely upon the opinion of the court as to whether the law is necessary for the general welfare and hence authorized by the "police power."

As Mr. Justice Holmes of the United States supreme court has written, the extent of the "police power" depends upon "the prevailing morality or strong and preponderant opinion" of the time.[1] Therefore a conscientious court will endeavor to express the will of the majority in its opinion. An obstinate, narrow-minded court will deceive itself as to what the "prevailing morality" demands. But in either case the decision will be based upon the opinion of the court concerning what laws are required in aid of the general welfare. If the court holds the law "unconstitutional," there are two conflicting authorities—the legislature and the court—one holding the law necessary to the general welfare, and the other holding the law not necessary to the general welfare. And there will be not one word in the constitution requiring either body to make or to annul the law.

Under those conditions it is simply pettifogging to say that "the judges are forced to their decision by their oaths to support the constitution." The legislators who passed the law took the same oath. Neither the legislators nor the judges would violate their oaths by reversing their action.

[1] Noble State Bank *vs.* Haskell, 219 U. S. 104, 111.

When, however, the "conscientious opinion" of a court voices the individual conscience of the judge in opposition to the expressed conscience of the people the fulfillment of the oath to preserve the constitution may be seriously questioned.

As stated in the beginning, there is in these "police power" cases a conflict between two arms of government and only the people who made both can decide which is right. Furthermore—since the whole question at issue is: What is demanded by the prevailing morality?—how could the correct answer be more surely ascertained than by taking a well-considered vote on the question?

The established method since this republic was formed for obtaining this vote has been to submit an amendment to the constitution covering the question at issue. There are two strong reasons why this method is inadequate and unsatisfactory in dealing with "police power" cases.

1. Amendment of the constitution is a slow, cumbersome process; not adapted to the need for settlement of a conflict between authorities over what is "constitutional."

2. There is nothing in the constitution to be amended.

Taking these points up in order:

1. Amendment is a Cumbersome Process

Careful deliberation in amending the grant of a power or the prohibition of a power is the part of wisdom. The fundamental law should be as solid as the foundations of a building—only to be rebuilt with great labor and caution. But in disputes between the courts and the legislature over the police power there is no fundamental question involved. The "police power" builds in the superstructure of government. The foundations remain unchanged, regardless of whether the court permits the legislative masons to put on another story or to remodel the interior.

Excessive deliberation is exasperating to a people determined to right industrial and social wrongs. If the court's opinion of the prevailing morality is correct, the sooner it is sustained the better. If the court's opinion is incorrect, the sooner it is reversed, the sooner will popular antagonism to the court subside—and respect for the law be restored. Of course a reasonable period of consideration is necessary in order that the popular verdict may express a conviction and not a transient emotion.

2. Amendment is an Inappropriate Process

The strongest reason for a popular referendum on a "police power" decision is that there is nothing in the constitution to amend. There is no language to be altered, no new principle to be established. The legislature has the right to enact laws to promote the general welfare. The legislature has no right to take life, liberty or property without "due process of law." So it is and so it shall be. There is nothing for the people to amend in either the grant or the prohibition of power. It is also highly desirable that these two broad principles should not be qualified by a mass of formal exceptions.

The legislature and the courts have disagreed as to whether one particular law is necessary for the general welfare—is demanded by the "prevailing morality."

The people do not wish to change their constitution if they disagree with the supreme court. They simply wish to furnish conclusive evidence to the court of what the constitution as it is written authorizes, when interpreted in the light of the "strong and preponderant opinion" of the present generation.

Chief Justice Winslow of the supreme court of Wisconsin has written well and forcibly:[2]

> When an eighteenth century constitution forms the charter of liberty of a twentieth century government must its general provisions be construed and interpreted by an eighteenth century mind surrounded by eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.
>
> Where there is no express command or prohibition, but general language and policy to be considered, the conditions prevailing at the time of its adoption must have their due weight, but the changed social, economic and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.

A long list of decisions of state courts may be cited holding certain laws (largely "social and industrial justice" laws) unconstitutional as not "due process of law" and decisions by the United States supreme court holding similar laws constitutional as being "due process of law."[3]

[2] Borgnis *vs.* Falk Company, 147 Wis. 327. 1911.

[3] Address on the "Recall of Decisions" by Albert M. Kales, before the Illinois Bar Association, April, 1912.

Let us assume that the people would agree with the United States supreme court. Is it not a cumbersome, inept method for executing the popular will to require that in each of these cases an amendment to the constitution must be submitted to the people of the state and approved by popular vote and then that the legislature must reënact the same law previously passed? What is the logic of this long and laborious process? Why should a new clause be added to the constitution when no change in its language is necessary? Why should the complicated and expensive legislative machinery be again called upon to remake a law when the very vote of the people proves that the law was constitutionally enacted the first time?

The crux of the whole question is obtaining an expression, by popular vote, of "the prevailing morality or strong and preponderant opinion."

Why then submit the question as: "Shall the constitution be amended so as to empower the legislature to pass this law?"

The legislature has passed the law.

The supreme court has rendered an opinion that the law is not supported by the strong and preponderant opinion of the people.

The logical question to submit is:

"Did the legislature in passing this law represent the "prevailing morality or strong and preponderant opinion of the people?"

If the people answer "No," the opinion of the supreme court on this very question is sustained—because the court was right.

If the people answer "Yes," the opinion of the supreme court on this very question is overruled—because the court was wrong.

In cases involving the "police power" of a state the review by the people of a decision would be logical procedure to attain a logical result. Amendment of the state constitution in such cases is an illogical means to an illogical end.

Compare the two in parallel columns:

In cases where a state supreme court is of opinion that the "police power" of the state does not authorize the legislature to pass a certain law. Assume that the "strong and preponderant" opinion of the people favors the law.

PRESENT METHOD BY AMENDMENT OF CONSTITUTION		PROPOSED METHOD BY RECALL OF DECISIONS	
Probable Time	*AN ACT*	*AN ACT*	Probable Time
1 year	(1) Passed by legislature. (2) Approved by governor. (3) Held "unconstitutional" by state supreme court.	(1) Passed by legislature. (2) Approved by governor. (3) Held "unconstitutional" by state supreme court.	1 year
2-5 years	(4) Constitutional amendment passed by legislature (once or twice) or initiated by the people.	(4) Petition for review of decision. Same purpose as constitutional amendment but more accurately expressed and more expeditious.	2 years
3-7 years	(5) Constitutional amendment adopted by popular vote.	(5) Act approved and decision reversed by popular vote. *Becomes a law.*	
4-9 years	(6) The same act again passed by legislature. (7) The same act again approved by governor.	(6) Unnecessary duplication. (7) Unnecessary duplication.	
5-10 years	(8) The same act held "constitutional" by state supreme court. *Finally becomes a law.*	(8) Only needed to correct errors in 6 and 7 which are omitted —hence useless.	

Comments on diagram. Step 4. Under present method this procedure may take one year on direct initiation or immediate legislative action or possibly four years where the constitution requires that an amendment be passed by two sessions of the legislature or even ten years or more where a constitutional convention alone can amend. The sole purpose of the action is to submit the question to a popular vote. If the people are going to approve, why delay them? If they are going to disapprove, why delay them? Only those interested in sustaining minority government can find any virtue in preventing expressions of majority opinion. Furthermore there is something peculiarly inappropriate in the form of amending the constitution to change something which is not written in the constitution at all, but which appears in an opinion of the supreme court.

Steps 6 and 7 are simply waste effort. The legislature and the governor have gone through the travail of creating a law—only to see it smothered by the court. Why create a similar law if the old one can be revived?

Step 8 gives the supreme court the ungracious task of reversing itself, with all the incentive naturally incident to that painful process to find technical flaws in the manner in which its opinion has been set aside.

When one contemplates the possible delay of ten years in correcting the mistake of the supreme court in interpreting the prevailing convictions of the time—one understands the reason for a deep resentment in the community against "judge-made law." A partly corrupt legislature is lashed by public opinion into passing a "general welfare" law over the protests of special interests. Then the supreme court, deaf to the prevalent voices of social reform, annuls the law. The whole bitter struggle must be fought over again: a constitutional amendment passed once or twice (many states require the passage twice), the law passed again, perhaps loaded with new "jokers" so that the court will again declare it void.

The struggle for social justice under such conditions is a disheartening battle against overwhelming odds.

To wait ten years for a law to fit the new needs of a rapidly changing civilization is often to make a farce of government. In ten years the automobile, once a rarity in the streets, dominates the traffic, wireless telegraphy remakes conditions of sea travel, the phonograph, the trolley car, the aeroplane, moving pictures, a score of new and important factors affect the daily life of the people. All industry undergoes like changes. New problems, responsibilities and community interests come upon us and must be reckoned with and the law must change to meet them.

The statement has been made that more fundamental changes in the industrial and social order occurred between A.D. 1800 and A.D. 1900 than in the thousand or even two thousand years preceding A.D. 1800. Have the constitutions changed to meet the new needs?

In *The American Commonwealth*, Mr. Bryce, commenting on the difficulty of amending the Constitution of the United States points out (p. 373) the results of a too rigid fundamental law in language which might well be applied to state constitutions which although more readily amended also require more frequent revision.

Since modification or developments are often needed and since they can rarely be made by amendment, some other way of making them must be found.

The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend or usage may modify the express provisions of the apparently immovable and inflexible instrument.

Amendment by construction, like executive non-enforcement of unpopular laws and indirect taxes, is a method of self-delusion which belongs to a passing school of politics. Fooling oneself is a rather stupid game and the American people show many signs of a present-day willingness to look facts in the face, to discuss the disagreeable truths of poverty and inefficiency as well as to orate about "prosperity" and the "land of the free and the home of the brave."

Our constitutions are human products with human imperfections and need constant improvement. Our judicial decisions, be they ever so honestly made, are the products of the education and environment of ordinary human beings—called judges. The ermine may require respect for the office but it does not guarantee the wisdom or social conscience of the wearer.

In the end faith in democracy requires a trust in the superiority of the ultimate judgment of the whole people over the immediate judgment of a few of the people. There is no reply to Lincoln's assertion that the people are the rightful masters of both their constitutions and their courts, except the denial of the capacity for self-government, which in itself is a repudiation of the constitutions and the courts of democracy.

Those who would enshrine the judiciary as "sacred" from the control of the people are not believers in democracy. And frank reactionaries freely state their conviction that the people must be "saved from themselves." By whom? Plainly, not by themselves.

There is in the end but one honest choice: either government is to be of the people, by the people and for the people, or of a few, by a few and for a few. History records no instance of permanent government of the few for the many. The benevolent rulers of one generation beget the hated tyrants of the next epoch. The "free and independent judiciary" enthroned above the will of "transient majorities" may all too easily become the reactionary, oppressive oligarchy that sets aside the legislative enactments of sovereign states, that coerces executives to refuse obedience to the expressed will of the people.

Summary

Where the legislature and the courts disagree as to what the "prevailing morality" demands, the people alone can decide the controversy. In this way alone justice can be secured.

Amendment of constitutions is a cumbersome, inappropriate means for deciding conflicts between the legislature and the courts over the extent of the "police power."

The "recall of decisions" is a logical means since there is nothing in the constitution to amend, and the only question involved is: Did the court or the legislature correctly represent the "prevailing morality or strong and preponderant opinion" of the people?

The final issue between those intelligently favoring and opposing the "recall of decisions" is the world-old issue between democracy and oligarchy. Some believe in a divine favoritism in capacity for government. Others put their faith in the self-governing instinct of all mankind. To accept the sanctity of a judicial decision requires belief in the superhuman quality of the judge or in the inspired quality of his opinion. To accept the superiority of the crystallized opinion of all the people over the judgment of a few of the people requires faith in humanity itself.

There is the issue. The battle lines are drawn for the future, as in the past, between the conservative, fighting to retain the things that are, trusting to the wisdom of old counselors; and the progressive, pressing forward to what may be, with confidence in the greater wisdom of coming generations.

THE GRAND JURY OF THE COUNTY OF NEW YORK

A Personal Experience

By George Haven Putnam,
New York.

I have served on the grand jury for something more than a third of a century, and during the later years of this period my service has usually been that of a foreman, as the judge and the district attorney always prefer to secure as foreman a juror who has had previous experience.

The institution of the grand jury goes back many centuries and is doubtless of Saxon origin. The earliest reference in English legal history to an "accusing body" apparently possessing the function of a grand jury, dates from the time of Henry III when each county had its own accusing body. In these earlier days, the conclusions of the jury were arrived at without any examination of witnesses; the presentments being based upon the personal information of the jurors. The twelve jurors (the number originally fixed) were sworn to "speak the truth;" and as they were all selected from the immediate vicinage where the events occurred or the conditions existed, their conclusions were assumed to be based upon direct knowledge of the facts. This requirement, which has not been essentially changed during the later centuries, constitutes the essential difference between the requirements for a grand jury and those that are, at least at this time, in force for the making up of the petty jury. The petty jurors, who have the responsibility for the final decision of the case, are, under the routine now in force, supposed to come to the trial with blank minds. It is assumed that all the knowledge that they secure of the matter at issue is to be obtained from the evidence and arguments presented in the court. They are, in fact, instructed by the court that their decision must be arrived at without consideration for, or the influence of, any other facts or information than have been presented in the course of the trial.

The grand jury as now constituted comprises, including the foremen, twenty-three members, and sixteen of these constitute a quorum. A true bill can be found, or a decision in regard to any matter

at issue can be arrived at, only with the vote of not less than twelve jurors out of a quorum of not less than sixteen. The persons to serve as grand jurors are selected from the list of trial or petty jurors by a board comprising the presiding justice of the appellate division of the supreme court in the first department, the mayor, an associate justice and two justices of the court of general sessions. The commissioner of jurors serves as the clerk to said board and produces for their action the lists of jurors. This board also fills vacancies in the list. The persons selected are supposed to be men accepted as possessing standing and character in the community. It has proved possible, however, at times when the control of the city government was in the hands of Tammany Hall, to secure the acceptance in the list of grand jurors of men who could not properly so be described. It has been charged in fact that in years past men have been placed upon the grand jury for the particular purpose of protecting certain persons whose business and whose operations were opposed to the interests of the community and were likely to come under investigation.

The grand jury list or panel was for a number of years restricted to one thousand names; but in June, 1910, the panel was increased to twelve hundred. If one thousand jurors were required to carry on without hindrance or delay the business of the grand jury for the city of twenty-five years back, a panel of not less than three thousand names should be instituted in order to provide, without undue burden upon this special group of representative citizens, the necessary facilities for taking care of the routine business and to leave time free for the general supervision on the part of the jury of the operations of the city departments and for such special investigations into the work of the municipality and into alleged abuses as they may find occasion for. Twelve hundred men are not sufficient to give due attention to these two classes of responsibilities in a county containing more than three millions of people. During the past few years, it has been necessary to keep two grand juries in session each month, and not infrequently has there been requirement for the work of three juries sitting at the same time.

The service of a grand jury continues as a rule during the calendar month, but if at the end of the month the jury has on its hands any unfinished business, an investigation, for instance, in which a portion only of the witnesses have been heard, it is customary to

hold the jury in session for such further time as may be required to complete each case that it has undertaken. The sessions of the jury are held daily, except Saturdays, but if a jury is continued in existence for the completion of unfinished business, it is not as a rule necessary during a second or third month to hold daily sessions.

Grand juries are sometimes called for the purpose of conducting a special investigation, and in that case they are held for periods extending from one month to five. The foreman is selected by the court after the twenty-three names have been drawn from the clerk's box. The foreman has authority to excuse certain members of the jury from day to day as long as he retains for the work of the day not less than the quorum of sixteen. The wise foreman will, however, refuse to excuse more than three men for any one day. It is difficult to ensure adequate attention for certain classes of business or to feel assured that justice has been done in important cases, unless at least twenty men out of the twenty-three have listened to the evidence. There is, of course, also always the chance that owing to temporary illness, or to some urgent requirement, one or more jurors may be called away in the course of the day's session.

The fee of two dollars is no greater than that accorded to the members of the petty jury, and the foreman, who is called upon to give a very much larger amount of time and skilled labor to the work, receives the same compensation as the other members. The foreman is expected to report earlier than the hour fixed for the session, in order to consider with the district attorney the business to be taken up. He is often called upon to remain after the session has closed, for the purpose of examining papers and of giving judgment in regard to witnesses to be called for the next day's session. The responsibility rests chiefly upon the foreman of initiating any special business to be taken up by the jury, and it is the foreman also who is expected as a rule to prepare the text of presentment or of reports on special investigations. A compensation of not less than $5 a day would be in order if only to indicate the difference between the requirement made upon his time and attention as compared with what his associates are expected to give.

The grand jury sits as a part or division of the court to which it is attached, and by which it has in fact been constituted. This court is either the general sessions or the criminal division of the supreme court. Its room has, therefore, the character of a court room, and

the foreman is expected to enforce the same dignity of procedure as is proper in a court when the presiding judge is present. Upon the foreman rests the responsibility of administering the oath or the affirmation to the witnesses, and the examination of the witnesses, except in the cases in which the foreman decides to place this in the hands of the district attorney, is conducted by the foreman. This routine calls for the active attention of the foreman during the whole of the session.

The business of the grand jury room in the county of New York is carried on quite largely in language other than in English. There are at this time from 70 to 100 different languages and dialects spoken within the county, and the proportion of trouble of one kind or another that comes upon our foreign citizens appears to be decidedly greater than that with which those of English or American birth are concerned. The grand jury has, therefore, subject to its call the interpreters attached to the court, men who are able, with a few exceptions, to compass the series of languages in which evidence is given. Many of these interpreters have served for a number of years, and their capacity and trustworthiness are vouched for by the court. Each interpreter must, before his statement can be accepted in a case, be sworn for the service of the month. There is risk that the interpreter may, instead of putting the question exactly as given by the foreman and of presenting a precise rendering of the reply of the witness, take the matter somewhat into his own hands. He has often talked with the witnesses before coming into the jury room, and he has his own definite opinion as to the nature of the case. This opinion may in the majority of cases be well founded, and I have, as foreman, not infrequently had occasion to express my obligation to the interpreter for suggesting a line of inquiry that had not occurred to me.

It is, however, undesirable to allow the interpreter to manage the case, and it is, of course, important also to bring home directly to the consciousness of each juror as far as possible the precise statements submitted by the witness. In past years, I have also had occasion to doubt the trustworthiness of interpreters who have been appointed under the recommendation of Tammany officials, and I have found that they were managing cases in a way that was not conducive to justice. I have made it a practice, therefore, as foreman, to utilize whenever possible the service of some member of the jury

for questioning witnesses who could not make their statements in English. It is very seldom that a group of twenty-three New Yorkers does not include men who are conversant with German, French and Italian. In a city which contains one million Jews, we are also often able to secure from a juror the service of Yiddish. I have been able myself to manage inquiries in German when I was doubtful of the trustworthiness of the interpreter, and I always take pains in any case to check off the accuracy of the interpreter's reports in German and in French. I was puzzled once, however, with a language that was outside of the abilities of either the jury or of the court interpreters. A case was brought to us in which the person under charges and all the witnesses were reported as Chaldeans, that is to say they came from the lower Tigris. No gentleman on the jury would undertake Chaldean, and the several official interpreters gave up the task at once. I adjourned the case and sent to the police captain of the precinct where the Chaldean colony was situated, asking him to send up to the jury room a Chaldean who could speak English and for whose trustworthiness he could vouch. An hour later, my Chaldean citizen appeared and took charge of the case. I signed the indictment in due course and I only hope that it was the right person who was presented for trial. The Chaldean citizen, with his service first in the grand jury room and a fortnight later in court, was in position to clear off any old score that he might have had against a fellow countryman.

The time of a grand jury which has not been drawn for any special emergency is taken up chiefly with the routine business that comes in through the office of the district attorney. The complaints upon which the jury acts are in a majority of cases shaped before the magistrate or police justice. The district attorney takes note of the witnesses who have given testimony, or whose names have been specified in the proceedings before the magistrate, and he has these witnesses subpoenaed to appear before the grand jury. The responsibility rests upon the office of the district attorney of selecting and shaping the cases to be considered by the grand jury in such manner that witnesses shall not be called upon to give their time for more than the one day, usually the one morning. There are too many instances, however, owing either to incorrect calculation as to the time required for an individual case, or to heedlessness in which witnesses are called upon to sit in the witness room several

days in succession before their testimony can be taken. A careful foreman will take pains from day to day to make a personal examination of the persons that are waiting in the witness room and will himself take action to prevent as far as possible the hardship of needless detentions. A foreman will sometimes hold a jury for fifteen or thirty minutes after the usual time of adjournment rather than to subject to a call for another day witnesses who have passed their whole morning in the witness room. The foreman will take pains to assure himself through reports from the office of the district attorney that the cases shall not be presented in the chronological order, but in the order of their actual urgency, and the urgent cases are, of course, those in which the persons under charges are also under arrest, and those in which the detention of witnesses (for instance, women with babies) involves hardships. The bail cases should always be held over until the jail cases have been disposed of.

Attention should also be given to securing promptly the evidence of witnesses who are in the house of detention, or who, not being residents of the city, have been held under subpoenas, when they want to get away to their homes or on their own business. It is sometimes advisable to take testimony from such witnesses in advance of the time when the district attorney is prepared to shape the case for final consideration. It is only necessary when the case finally comes up for completion, either to have the stenographer read the testimony given a day or two back, or for the foreman to recall to the jurors the substance of the same. Whenever the urgent jail cases, and the most important of the bail cases have been disposed of, so that there are no arrears on the calendar, the jury is free to give attention to the other division of its duties, namely, the inspection of city institutions or an investigation into the work of city officials and the management of city departments.

The foreman sometimes finds it desirable, for this purpose, to arrange for a personal investigation of city institutions, such as the Tombs, the prison and asylums on Blackwell's and Ward's Islands, etc. It is sometimes wise to utilize for such investigations the entire body of the jury, while occasionally for some special investigation time can be saved by detailing one or more sub-committees upon whose report the jury can take action. Such investigations are sometimes made under the instructions of the court, but are often undertaken at the initiative of the jury itself. It is the duty

of any individual juror to bring to the attention of the body any abuses of which he has personal knowledge, or which have been brought to his attention by responsible citizens, and if the time of the session permits, the jury will take prompt action on such a complaint. A juror bringing into the jury a complaint or grievance of which he has personal knowledge will be sworn as a witness. From time to time, as before mentioned, a jury is appointed with instructions in regard to specific investigations, and such a jury is freed from the routine business of jail cases or of bail cases.

A number of years back, I served as foreman of a jury which sat for five months, and which was charged with the duty of investigating the management of certain of the city departments. It was at the time when the organization known as the county democracy was under the direction of leaders like Judge Henry R. Beekman, who were endeavoring to overthrow the control by the Tammany leaders of the Democratic votes of the city. Among the men who were active in the county democracy was Hubert O. Thompson, who during the period in question secured office as head of the department of public works. My relations with Thompson in the committee rooms of the county democracy became somewhat strained when as foreman of the grand jury, I found occasion to take proceedings against his management of the public works. It was under Thompson that the city's money was squandered in the county court house, and it was chiefly as a result of malfeasance shown in connection with the county court house contracts that we finally found it necessary to frame an indictment against him. He skipped his bail shortly after and fled to the West Indies, and the committee rooms of the county democracy lost the value of the service of this particular reformer.

I may mention here as an illustration of the kind of evidence that was brought out in the history of the court house, the record of the contracts for painting the inside of the building. Thompson was under obligation to put up for competitive bidding all contracts for work amounting to more than $1,000. He divided up the painting surface into sections so that the cost of each section need not exceed $1,000. He went through the form of taking competing bids and awarded the contract for section number one to a pal of his own whose bid as recorded proved to be substantially lower than that of his competitors. The work on this section, including the

charge for the scaffolding, was in fact done below cost. The second and the remaining sections were treated in the same manner, but in each case the other bidders found it necessary of course to include a charge for their scaffolding. The canny friend of Thompson whose scaffolding had been more than paid for in the compensation for sections one and two, was able to make a lower price for all the succeeding sections than was possible for his rivals, but even with this low price he got paid for his scaffolding almost as many times as there were sections in the building. It is not surprising that at the end of his operations in the court house he was willing to paint the commissioner's house without any charge.

The grand jurors find themselves not infrequently in doubt in regard to the credibility of a witness. The witness does not, at least in these preliminary proceedings, have to stand any cross-examination, and the jury should, of course, guard itself against the risk of basing an indictment upon evidence that does not impress them either as coming from a responsible person, or as being fairly well confirmed by corroboratory statements. I remember one case during the Thompson investigation in which an ex-employee of the department gave evidence which was decidedly important if true. I found after the witness had left the room that a number of the jurors had doubts as to his veracity. I noticed that the man wore a grand army button, and I said, "I think I can check the man's general truthfulness." I called him back and inquired about his army service.

"Where were you?"

"Chiefly in Virginia, sir."

"What battles were you in?"

"Well, sir, I was at Bull's Bluff, and in the battles of the peninsula, and all round."

"Who commanded at Bull's Bluff," I asked.

"Well, sir, Colonel Stone thought he commanded, but the gentleman on the other side did most of the commanding that day." It was evident to me that the fellow had been at Bull's Bluff, while his answer showed a capacity for discrimination and judgment that strengthened my belief in his testimony.

The jury depends for its legal advice upon the office of the district attorney, although it is also at liberty to make application for any special counsel to the judge of the court in which it has been

impanelled. It is the practice of the district attorney to place at the disposal of the grand jury of the month one of his assistants who takes charge of routine business. In case, however, the month brings up cases varying in character, or if in the arrangement of the work of the office, the preliminary shaping of cases has been divided between several assistants, the jury may have a different legal adviser from day to day, or from hour to hour. The purpose is that as far as possible the case shall be shaped for the grand jury by the assistant who will have the personal responsibility for its management in the trial later. It is for the jury, and as a matter of routine for the foreman, to decide whether he will retain in his own hands the questioning of the witnesses or will ask the assistant district attorney to take charge of the matter. With hardly an exception, a suggestion on the part of the district attorney or his assistant that, having full knowledge of the history of the case, he can manage the questioning more effectively and with some saving of time, is at once accepted by the foreman. The foreman may, however, even then find it desirable, in order to be sure that the matter has been fully presented to the jury, to supplement the questions asked by the district attorney.

I had the opportunity of utilizing the grand jury for the defense of the reputation of my old commander, General Grant. The general had thought himself fortunate in being able to arrange to place his two sons in Wall street in association with a clever but unscrupulous financier, Ferdinand Ward, who was known at that time as "The young Napoleon of finance." In the firm of Grant and Ward thus constituted, the general himself became a special partner with an investment that represented practically all of his savings. The new firm carried on business for a year or two, and secured by subscriptions from various citizens, Wall street men and others, the use of a large amount of money for "investment" in a series of mythical "contracts." Ward represented to the investors that, through the influence of his special partner, the firm had been given certain special advantages for securing government contracts, but that it was, of course, not possible under the circumstances, to specify what the contracts were. The money thus secured was thrown away in South American speculations, and when the firm stopped business, the assets were practically nil.

I found that the city had money on deposit with the Marine

Bank, the president of which, Fish, had taken an active part in Ward's speculative undertakings and had made to inquiring investors false statements about the deposits of Grant and Ward in the Marine Bank. This connection of the city depository with the firm gave the grand jury the opportunity of inquiring into its operations. I had the opportunity of examining the two sons of Grant who impressed me as somewhat obtuse men who had not shown proper intelligence in protecting the good name of their father. I also examined Ward at some length, and as he was at the time under conviction with a prison sentence and had nothing more to lose, his testimony was given with full frankness and with some sense of humor. He prided himself on his ability in inducing experienced men of business and officials like the city chamberlain to put money in his hands into a blind pool. I was able, as a result of his testimony and that of the two young Grants, and after an examination of the correspondence with the general, to make clear, in a presentment on the affairs of the firm, that General Grant had been entirely innocent of any knowledge of the mythical government contracts and that he had been kept carefully ignorant of the misuse that was being made of his name.

It is natural, under the routine that has grown up, that the office of the district attorney should assume the general direction of the work in the grand jury room; that is to say that the district attorney himself, or one of his assistants should determine from month to month and from day to day what work the jury should take up and what witnesses should be called. This routine is, however, merely a matter of convenience and does not mean that the district attorney has any authority to determine the action from the grand jury.

The jury, that is to say practically the foreman, sends for his legal adviser when he has need of him and if the jury decides to initiate certain business of its own, and is prepared to take the responsibility of completing such business without the aid and without the presence of the district attorney, it is within its rights in so acting.

I had the opportunity some years back of making a test of this matter of the relative authority of the grand jury on the one hand and the district attorney on the other. I was, as foreman, carrying on an investigation into the work of certain of the city author-

ities, and more particularly, in regard to the relations between the police department and the law breakers who were securing police protection.

The notorious Devery was at that time chief of police and G. was the district attorney. Mr. G.'s leading assistants were Mr. U. and Mr. M. Among the law breaking concerns that we were investigating were the pool rooms, and at the head of the pool room business stood Mr. F. F. and Devery were brothers-in-law, and there were indications of a brotherly arrangement between the two, as a result of which it was very difficult to secure police evidence or police action against any of F.'s pool rooms.

I may recall here a noteworthy example of conflict of evidence. Two citizens who had volunteered evidence in connection with our investigation of the protection given by the police to law breakers, one of whom was a clergyman in good standing, reported that between the hours of two and three on the morning of a certain Sunday, they had found a notorious saloon in the tenderloin open and carrying on an active business. The saloon had an illuminated sign hung at right angles directly across the sidewalk a little above the head of passers. When the place was closed, this sign was dark. These men testified that noticing as they passed the illumination of the sign, they went into the saloon and saw drinking going on with men and with women present. One of them, in order to comply with the rather exacting provision of the law, took pains himself to purchase and to taste a glass of spirits. I examined later the roundsman, who was on beat in this street in the hour in question, the sergeant who with a fresh patrol relieved the roundsman, the captain of the district who had been carefully cautioned some little time before that the law was not being enforced and who reported that as a result of this caution he had made during the proper hours a personal inspection of the suspected places, and finally the inspector, who reported that he also had after caution been interested in going over the territory in this district. Roundsman, sergeant, captain, and inspector all swore that they had been on this block between the hours of two and three, and that the saloon complained of was dark and to all appearance fully closed. The grand jury reported charges against both inspector and captain. They were not removed but they were cautioned, and transferred to a district that was less "profitable" than the tenderloin.

The jury came to the conclusion that the influence and the machinery of the district attorney's office were being utilized to protect the law breakers and to render difficult, if not impracticable, the collection of final or legal evidence against them. They believed there was a "leakage" in the district attorney's office of information in regard to our proceedings. I sent subpoenas direct (that is to say, not through the office of the district attorney) and I wrote letters direct to certain witnesses whose testimony was desired. I also received from certain public-spirited citizens proffers of testimony, and in a number of cases, these offers were connected with the request, or practically the condition, that they should not be called upon to testify in the presence of the district attorney, or any of his assistants. The risk of interference with a man's business or even with the comfort of his residence, if his name came on to the black list of Tammany, which meant, of course, the black list of the Tammany police in his own district, was serious.

On one morning early in the month, I was taking testimony from one of these witnesses who had volunteered information. The district attorney came into the room without first sending inquiry, or even without knocking, and he brought with him one of his assistants. My witness was one of those who wanted to keep his evidence, for the time at least, confidential, and I promptly sent him out of the room. I then explained to the district attorney that we were completing certain business that had been initiated by ourselves, and that we had not at that time requirement for the service of any one of our legal advisers. The district attorney replied, "I have a right to have knowledge of your proceedings, and for that purpose, I propose to remain while this evidence is being submitted."

The foreman: "We have decided, however, that we can do this business more effectively without your presence and I request you to withdraw."

The district attorney: "I decline. I have a right to be here."

The foreman: "We believe that you are in error in that contention, and that sitting here as a court, we have a right to control our own premises. I direct you to withdraw."

"I refuse," said the district attorney, "and you will find that you do not know what you are talking about."

Thereupon, I took the jury downstairs, put the question up to the court, and the district attorney and his assistant followed. "Your

honor," I said, "the grand jury is carrying on certain investigations of its own, and has made no requirement for the service of advisers from the office of the district attorney. The district attorney is interfering with the procedure of our business, and is, therefore, delaying our work. We understand that we have the authority to control our own premises, and that the district attorney is to come to us only when we have sent for him. We ask your honor to decide whether our understanding of our rights in this matter is correct."

"What has the district attorney to say?" inquired the court.

Mr. G. then went on to explain at some length how his ancestors had raised the first American flag on Manhattan Island. The court finally interrupted him. "That is not to the point, district attorney. I am waiting to hear your reply to the point raised by the foreman." Mr. G. then began a narrative as to how near he had been to being present at the battle of Gettysburg. The patience of the court became exhausted, and the district attorney was told to sit down. The court then delivered judgment in favor of the contention of the grand jury. "Gentlemen," he said in substance, "you are correct in your understanding. You occupy your premises as a division of this court and you have a right to control your court-room and your time as, under the provisions of the law, seems to you best. If you are prepared to take the responsibility of initiating work and of arriving at decisions without the counsel of your legal adviser, you are within your rights in so doing."

We returned to our room, and in the course of the following weeks made good progress with our investigations. One conclusion at which we arrived was that the district attorney's office was being used to protect wrong-doers and to interfere with the operations of justice and I made a presentment to such effect. The result of such presentment, after two sets of investigations by the governor of the state (at that time Theodore Roosevelt), was that Mr. G. was removed from office. The governor directed me to come to breakfast with him so that he might secure the full particulars on which our charges were based. He took pains to report to me later that he never could have succeeded in getting rid of a district attorney, whose office represented the worst of the Tammany methods, if it had not been for the information contained in our presentment. I understood that the issue had not before been raised in the county of

New York, and that the precedent that had been thus established was of importance. A week or two later I received a letter from a foreman of a grand jury sitting in Providence asking for the details of our action. He wrote again at the end of the month that their jury had been conducting a similar municipal investigation, and that they had been able to bring it to a successful conclusion only when, under the precedent established by us, they had gotten rid of their district attorney. The district attorney took the ground that the presentment of the grand jury was an impertinence in itself, and that the shaping of such a presentment to the court was outside of the function and the authority of the jury. He made application to the court to have the presentment expunged from the records of the court. This application came up in the month succeeding the work of our grand jury, and was submitted to a judge who had been elected on the Tammany ticket and who was supposed to be not out of sympathy with the policy of protecting Tammany officials.

The late Wheeler H. Peckham, a leader of the bar who was always ready to render unselfish service to the community, volunteered to defend the action of the grand jury. He explained to me that there was no precedent for such an application as had been made by the district attorney, and he presented to the court a carefully prepared argument to the effect that the grand jury had acted within its rights and that the presentment properly belonged on the records of the court. The judge decided in favor of the application of the district attorney, and the presentment was, I believe, duly "expunged from the records." One result, however, of the publicity given to the matter was that the purpose and character of the presentment were brought to the attention of the press in the city and throughout the state, and the essential portions of it were brought into print in a large number of papers. If it had not been for the application of the district attorney, very few citizens would have known that such a presentment had been made.

During the rest of the month, our relations with the office of the district attorney were naturally strained, and I found it advisable to take the counsel that I needed from the judge. I was still in perplexity in regard to my subpoenas and correspondence, because in so far as the letters were written by the stenographer assigned to our room, information about them was promptly given to the

district attorney by whom the stenographer had been appointed. I finally took one of my daughters, who was a clever stenographer, to the judge's house in the evening and had her sworn in as a special stenographer of the court for that month. From the rooms of the grand jury, I took home notes, on the basis of which I dictated letters through the evening. My girl typewrote the letters, sitting up for the purpose until late hours; and in the morning I took down the typewritten sheets and after they had been approved by the grand jury, I signed and dispatched them. We succeeded in getting in this way valuable evidence which would never have come to us through the district attorney's office, and as a result of our action a number of the police officials were brought to trial. One of the sheets typewritten by my daughter came into the hands of the district attorney, and he thought that he had then secured a real ground of complaint against the foreman. I was summoned to court to meet the charge submitted by the district attorney that I had broken my oath and had permitted the business of the grand jury room to come to the knowledge of some outside party. As evidence of this charge, one of the letters typewritten by my daughter was held up in court with the word that the typewriting had not been done by the official stenographer. "What have you to say?" asked the court of the foreman. "Your honor will recall," I replied, "that early in the month your honor swore in for the use of the present grand jury a special stenographer, and I am able to state that no papers or correspondence connected with the work of the grand jury have been in the hands of any but the regular stenographer and the special stenographer appointed by the court." The district attorney was taken aback and was very much annoyed. At the end of the session, the jurors gave me a dinner and a piece of silver, and they sent to the special stenographer, whom they had never seen, but who had, as they realized, rendered good service to them and to the city, another piece of plate filled with roses.

Shortly after the completion of the work of this particular jury, I was called upon for service in the committee of fifteen, the operations of which extended over two years.

The information secured in my experience on the special investigations of the grand jury was of immediate service in connection with similar work undertaken by the committee of fifteen, a committee which came into existence in 1900, and the operations of which con-

tinued for two years. This committee arrived at a series of conclusions in regard to the relations between the police and the other municipal authorities and the law breakers. It was clear to us that the Tammany officials had been interested in securing enactment in Albany of strenuous laws for the suppression of bad houses and of gambling and pool rooms, and for the restriction of the sale of liquor, for the purpose of being in a position to sell at substantial prices the privilege of breaking the prohibitions of such statutes. We estimated that in the year 1900 not less than $2,500,000 had been collected through the police officials from the managers of bad houses, of gambling houses, of pool rooms, and from the dealers in liquor as consideration for "protection" by the police. Each person, roundsman, sergeant, captain, and inspector, through whose hands the collections went, was entitled to retain as commission some portion of the dirty money. I had occasion later, when Mr. McClellan was trying to secure a reëlection, to make a summary, printed in the *New York Times*, of the bad appointments for which during his first term he had been responsible. I pointed out that the man he had appointed as chief of police had been shown up by the Lexow committee as having received while inspector weekly payments from bad houses. Instead of demanding an investigation, the inspector had promptly resigned from the force. His return as chief of police constituted, as I pointed out, an insult to the city, and naturally tended to the demoralization of men for whose discipline he was responsible. The result of my publication was a suit for libel brought by the official in question for damages of $50,000. It took me three years to bring this suit to trial, and the plaintiff offered to compromise for $25,000, for $10,000 for $5,000, and finally for $1,000. I refused to make any payment which would imply that my charges had not been well-founded. I finally succeeded in getting the suit brought to trial, with the result that the jury gave a verdict for the defendant, but the proceedings cost me something over $1,200. The information upon which the investigations of the Lexow committee were based was in large part the result of the presentment of the preceding grand juries.

In our undertaking to trace the relations between the police and crime, and particularly to break up the operations of the infamous cadet gang, we found ourselves from time to time confronted by one of Mr. G.'s chief assistants. I had here corroboratory evidence of

the relations of the office of the district attorney with the law breakers, with whose business we had been interfering. Fortunately, conditions have very much improved since the time, some twenty years back, of this special jury experience. I doubt whether it would have been possible at any time since that date for the law breakers of the city to secure any help or protection from the office of the district attorney, and during the past ten years, and particularly the last four years, the operations of this office have been managed with exceptional efficiency, as well on the ground of good judgment as of initiative and courage.

My own experience gives me ground for the following recommendations in regard to the work of the grand jury:

1. The panel should be increased promptly to not less than two thousand, and preferably twenty-five hundred names.

2. More thorough supervision should be given to the examination of the men selected for the list with reference not only to the fact that they are decent citizens, but that they have in their careers given evidence of such general capacity as would make their judgment serviceable in the grand jury room. There are still examples, although it is fair to say that at this date there are comparatively few, of men who under some personal influence have been included in the grand jury list, whose capacities are not up to the requirements of the post. Some of these men, through stupidity, and others through perversity, interfere with and delay the proceedings.

During the operations of the committee of fifteen, we had occasion to make a raid early Sunday morning on a notorious house in a down-town police district. The owner of the house was, as we found a little later, a member of the grand jury at that time in session, before which jury our charges against the arrested man were to be submitted. Under the report of the committee, the person in question was dropped from the grand jury list.

3. There should be a reshaping of the business to which the grand jury is called upon to give its attention, and it should be freed from the necessity of passing upon a long series of cases which do not require the judgment of twenty-three citizens. In London, county magistrates, or police justices, have the final disposition of a large number of the smaller issues which, under the routine in New York, after taking time in the magistrate's court with witnesses and officials, call for further time in the grand jury room from the same

witnesses and from twenty-three citizens before being finally passed upon in the court of general sessions, with the requirement for a third service from the same witnesses, and with the expenditure of valuable time on the part of more officials.

A body which has in its hands the authority to investigate into the workings of the city government and to call before it for the purpose the highest city officials, and which in criminal proceedings is charged with the responsibility of decisions in the most serious class of crimes, ought not to be called upon to give time (the time of twenty-three men) to passing upon a quarrel between a couple of intoxicated men, or to reaffirm a fact which has already been established by satisfactory evidence that a citizen had a pistol in his pocket, or to take action in a long number of simple cases in which the party under charges has already pleaded guilty.

A number of these cases, particularly the smaller ones, such as the enforcement of the laws against concealed weapons, ought to be finally passed upon, without appeal, by the police justice. The cases, excepting those of the highest crime (in which there is occasional risk of an hysterical and untrustworthy confession), under which the defendant pleads guilty, may properly go directly to the court. If in criminal proceedings, the grand jury had to do only with cases of serious misdemeanor or with cases of possibly smaller moment, but in which the evidence was complex, the hours so saved could be well expended in a closer supervision of the work of the city departments and of the operations of city officials, and in carefully considered recommendations for the improvement of municipal methods and the removal of abuses of one kind or another.

The grand jury is, in my judgment, a most valuable institution. It constitutes the only means by which citizens who are not in office can bring to bear directly, and with a measure of authority, their criticisms or inquiries concerning the methods of action of the officials that they have put into office and of the government the cost of which they are sustaining. While the term is but brief (as a rule it does not exceed thirty days), during such term the twenty-three men represent directly the highest authority of the citizens of the community and their authority and responsibility can be, and has been, exercised in the defense of the rights of citizens and in furtherance of the interests of the city.

The difficulty that suggestions or recommendations, however valuable, arrived at by one grand jury are apt to be overlooked or to fail to secure adequate attention on the part of succeeding juries, has in the past prevented certain investigations from being initiated which could not be completed within the time available. The attempt is now being made to remove this difficulty. Certain public-spirited members of recent grand juries have come together in a continuing committee, which, while possessing no official authority, has the power and the opportunities that belong to direct knowledge and experience, and to unselfish public interest. This committee is in a position to impress upon successive grand juries and upon the community the importance of one undertaking or another which may be put in train and for the proper carrying out of which continuity of action is important. Such continuing committee, made up of active and public-spirited representatives from the grand jury panel, can render intelligent service and can do much to strengthen the efficiency of the work of successive juries.

THE POLICE AND THE ADMINISTRATION OF JUSTICE

By George H. McCaffrey,
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It is a far cry from the stately black robed justices of the United States supreme court to the lowliest administrators of justice in this country. Nor is the difference in dignity greater than the difference in authority, for to my mind the lowliest administrators of justice in this country are not the police court magistrates, or "squires," but the policemen themselves, though as such they are not authorized by statute or by-law, not to mention the constitution. When administering justice in this fashion the police derive their powers from the common need and common consent of those to whom and for whom they are administering it.

I am assured on every hand by police officers that the number of cases which they try, decide, and settle without any strictly legal right to do so, contrary to the letter of the rules, and at the risk of charges being preferred, or of a suit for damages, is many times larger than the number which is or could be brought into court. These cases are the result of everyday happenings, so trivial that a police court judge would rebuke a policeman for bringing many of them into court, yet so important to the principals that if not settled somehow they would add immeasurably to the bitterness of life, and very frequently lead to really serious offenses when the parties attempted to settle the matter themselves. The ordinary policeman has no power to act without a warrant or some other writ in a civil case, but in the foreign quarters of our cities, if some poor fellow comes up to a policeman with the startling statement that he has been robbed of his trunk, investigation will usually show some disagreement between a lodger and a landlord about the customary payment of 10 cents for the rent of a bed for a night. The policeman's protestations that he cannot act in the matter are meaningless to the disputants; and at the end of five or ten minutes of argument, flattery of the officer, and personal descriptions of each other, the trouble will finally be settled to the moderate satisfaction of everybody by the officer's shrewd guess as to the rights of the case. To have thrashed the matter out in court

would have taken a half hour, cost the men a day's pay, if not also lawyers' fees, and perhaps not have settled the matter rightly after all.

Again some little children come to the policeman about midnight to announce that a man is killing somebody in their block. As the place is approached it certainly sounds that way, but really the neighborhood is being aroused by two half drunken oafs shouting wildly at each other across an areaway, and ably supported by their several women folk and the whimpering of about a dozen children. The policeman's command to stop the noise is met with a profane order to get out of the house if he has not got a warrant. The reply to that is to drag the legal expert downstairs, and arrest him for drunkenness. The next morning the fellow has sobered up enough to remember that if he does go to court he may lose his job, or he may get a fine, and that if he should prefer charges against the policeman he would have to walk a chalk line the rest of his days, so he usually forgets that his "house is his castle" and is glad to be released by the probation officers, as having been arrested for "safekeeping," or some similarly vague charge. The important facts, however, are that a fine brawl was prevented, and that the several hundred tired people within earshot got to sleep. Elsewhere in the city, a short chase and a swift kick will adjudicate some case concerning stolen apples far more effectively than the juvenile court and the simple statement to respectable parents that their son has broken Mrs. ————'s window throwing snowballs ends that matter.

On a busy route a policeman could not even write up his reports of such cases. In settling nine out of ten of them he probably exceeds his legal powers, but he furnishes rude justice more cheaply and more efficiently, because more seasonably than the courts could. If a person well acquainted with the ordinances of a large city, walks its streets for five minutes he can see from one to a dozen violations of them. So can the policeman, but the latter must decide, first, whether the matter is worth taking up at all; second, whether he has power to interfere; thirdly, whether it would be better for him to try settling it off-hand, to arrest the offender, or to apply for a summons. The number of civil suits for false arrests against policemen shows that their decisions are frequently disputed, but the number decided against them is comparatively small, despite the disgusting tendency of juries to "soak the cop." The wonder is, considering the legal training of the policemen and the multitude of ordinances, that they

make so few mistakes. That there is danger in the practice is indubitable, but the ease with which complaints are made to police superiors, the ever present resort to the courts, and the policeman's constant fear of making false arrests keep the danger at a minimum. Such police work in some continental European countries is legally recognized and the policeman can impose and collect fines on the spot for petty offenses, or as in Prussia have his superior officer send a polite note informing you that you have been fined a few marks. How excellent a means to check spitting on the sidewalk, or throwing paper on the street!

That the use of such discretionary power by policemen is necessary and wise, I do not doubt. It cannot be governed by strict rules, for its very existence is due to the rigidity and ponderosity of the regular judicial machinery. It must be left to the experience, diligence, and common sense of the policeman, and the only way in which the superior officers can increase those qualities is through the training which the new men receive. The efficiency of a police department depends largely upon the respect with which it is regarded by the populace and this respect rests in a very large degree upon the ability and tact with which such small happenings are handled.

A different story is to be told when the policeman does appear in court. There the man who has been selected as physically and mentally alert, who has seen thousands of cases, has given testimony in hundreds, who is through his experience accustomed to noting facts and circumstances in the midst of excitement, that would escape an ordinary person at any time, and, more important still, to remembering them some time afterwards, such a man is opposed usually by persons whose testimony is fallible and hazy enough in any event, and in the case of defendants very often deliberately perjured; yet equal credence is frequently given by judges in many cases. The lying defendant is all the bolder because he is aware that he will scarcely ever be made to repent of perjury in a police court while the slightest slip by a policeman will practically mean the prisoner's discharge, and all too often a public reprimand by a judge with his eye upon the newspaper reporters and reëlection. Where judges and district attorneys can be moved by political influence a deliberate offender is often discharged upon such manufactured evidence to the disgust of the conscientious officer who will be taunted with his failure by the defendant's friends. Is it remarkable then, that policemen, being human and knowing how per-

jury and influence permit offenders to escape justice, forget the ideal of complete impartiality and emphasize the facts against a prisoner? The natural result of such a vicious circle is that the public feels the policemen are incompetent witnesses, determined to get convictions at any cost, and very ignorant of the law; the policeman thinks the judges are wrong-headed, blind, or worse, and usually becomes discouraged and willing to let a case drop at a suggestion from the eternally busy and overworked district attorney. This phenomenon is widespread and from every policeman whom I have questioned the answer has been that the treatment given by the courts to their own servants, the policemen, is such as to discourage earnest, persistent, conscientious police work, and to encourage the people at large, especially the rougher element, in the belief that it is not at all hard or dangerous to win a victory over a policeman by deliberate perjury.

The lessons to be derived from these observations are important. If we are to permit any men to wield such wide discretionary authority, if we are to subject any men to the sneers of offenders and newspapers and still expect them to give full, unbiased testimony, we must first select a very high grade of men; we must secondly train them thoroughly; thirdly, make them feel that real public opinion is behind them, and that no influence sinister or otherwise will keep their superior officers from backing them to the end in a just cause. That is a very large task and one which in its entirety no American city has yet attempted, although many foreign cities have done so successfully, for example London and the great provincial cities of England. Some of our cities attempt no part of it. They take any hulk of a man with political influence and not too bad a record, and swear him in as a protector of the public peace. His pay is never very much, insignificant at first when the expenses are heaviest, and the chances to make money or to receive presents remarkably easy and numerous. His superior officer gives him a shield, keys, revolver, club, and book of rules, tells him to patrol a route, try to keep out of trouble if he can, but if he must "mix in" to "land the first wallop," and to ask any questions of his "side partner" or sergeant. Such is his training course.

The best type of man for making a good policeman is the skilled laborer, mechanic, or craftsman; men of perhaps high school education; men on the whole steady and with minds already trained to careful work. Fifteen years ago this was the type of man appear-

ing as candidate where examinations were held; now it is the teamsters, street car employees, and other unskilled laborers who largely predominate. Such men are not usually of very large mental calibre, and are very often lacking in respect for mental training.

The cause for the change is the pay. When a man enters the police force as a probationary patrolman he gets about $2 or $2.50 a day, a ditchdigger's wage; he must buy a costly uniform, and he is not sure of final acceptance. In New York and Boston alone of our large cities is the maximum pay as a patrolman over $3.50 a day while the much boasted pension is frequently very precarious. In Washington, the national capital, for instance, the full pension has not been paid in years. What is there, then, in such a proposition to tempt a skilled laborer from an eight-hour day at union wages? I feel strongly that probationary patrolmen everywhere should receive not less than $3 a day, and that some provision should be made so that they could pay for their uniforms on easy terms. It would be better still to provide them with an outfit for the season in which they join.

European cities find it advantageous to train men from one to four months before permitting them to do police work on their own responsibility. The course is physical as well as mental and in some cases very thorough. It embraces law from the policeman's standpoint, gymnastic drill, court work, and practical hints about police duty. I am glad to say that Chicago, Philadelphia and several other cities have started police schools and under the guidance of such men as Captain Martin Ray much good can be expected from them.

To make the men feel that their superiors are behind them heartily is a matter largely of personality and consistent effort, but it would be helped very much if superior officers would try openly to make details and extra duty fit in well with the convenience of the men, and watch over their comfort in other little matters, as well as being more open to suggestions and more ready to give advice in a pleasant manner to their subordinates. After a few years under a police system animated by a spirit such as this, I feel certain that the air of mutual distrust between the public and the policeman would disappear to be replaced by that confidence and pride in the "big brothers of the poor" which should be one of the rewards of a service at all times arduous.

THE USE OF THE PARDONING POWER

By William W. Smithers,

Of the Philadelphia Bar; author of *Executive Clemency in Pennsylvania.*

The phrase "abuse of the pardoning power" is an untechnical vernacular expression frequently used by newspaper writers in criticizing an act of executive clemency. The words import condemnation for improper if not dishonest action by an executive in respect to either a particular case or group of cases or general official policy. That presidents and governors have pardoned those who should not have been liberated is admitted, for the purely human factor cannot be eliminated. Human institutions will always lack perfection because they must be administered by imperfect human hands. While perhaps caprice and immoderate compassion have at times prompted unwise action there is no notable case of corrupt use of the power during recent years. The cases that have called forth seemingly justifiable popular disapproval have generally been those in which the executive has erred through misconception of grounds or because of deception practiced upon him. Exercise of the power is the most difficult of the executive and perhaps of all governmental functions. Its very nature invites or at least affords ready opportunity for the most unreasonable invective, calumny and innuendo. This is mainly because of the broad nature of the jurisdiction, the impossibility of review and, especially, because of the superficial knowledge of the subject among laymen and the meager special study given it by even the bench and the bar. The fundamental and important truth is that clemency is a distinct jurisdiction which is far removed from that of the courts. This is commonly overlooked or not sufficiently considered. The American theory of democratic government is now, and was at the outset, stamped with the recognition of the people as the source of all power and the delegation of that power with proper restrictions to clearly separated legislative, judicial and executive departments. The executive department is clothed with all the discretion of the people as a collective sovereign otherwise undelegated and is the least restrained of all the branches. No man or other branch of government can supervise, direct or review an executive's

actions, he is not subject to mandamus, injunction, *certiorari*, writ of prohibition or even subpoena in respect to his official conduct.[1] In this vast reservoir of discretionary power the federal and several state constitutions have expressly placed the prerogative of clemency—in some instances with restrictions, in others without limitation. It is significant that it has never been overlooked in any scheme of government since the dawn of history. It is born of the realization that human institutions administered by human agencies must always have a *residuum* of imperfection; that tradition has been as universal and constant as the most basic of nature's laws and as little modified by the vicissitudes of governments. In this country while the people have delegated their legislative power to assemblies and deposited a general corrective force in the courts, in matters pertaining to the life and liberty of citizens, they have conferred an additional power and laid a specific command upon the executive, intended to be used and obeyed despite and above the law, the legislature and the judges. It is the self imposed check and cautionary protest of the multitude against unanticipated and cruel consequences of governmental deficiencies. It is now conceded under American constitutions that an application for clemency is of legal right, whether based upon a claim of innocence or excessive punishment, and that a moral duty is imposed upon the executive to afford relief if a rational interpretation of all the data marks the case as entitled to remedy by the higher justice. It is not a question of guilt or innocence alone. Every circumstance pertaining to the event and the individual is relevant in *foro clementiae* which is untrammeled by rules of court procedure, legal maxims and evidential formalities belonging to the judicial branch of the government.

Practically all the state constitutions in substance contain the clause: "The supreme executive power shall be vested in the governor, who shall take care that the laws are faithfully executed."[2] Among his unenumerated "supreme executive" powers is that of clemency, which requires him to relieve from the regular operation of the laws those whom he may deem, in his wise and merciful discretion, the people intended should be exempt from the application of a particular law or the consequences of the rigid procedure of courts. He can no more honestly withhold a pardon in a proper

[1] *Opinion of Justices*, 120 Mass., 600; Hartranft App., 85 Pa., St. Rep. 433.
[2] Const. Pa., art. iv, sec. 2.

case than he can refuse to call out the militia when the preservation of public peace demands it. His oath to "take care that the laws are faithfully executed" includes the declaration that he will maintain the constitution which confers upon him the pardoning power. Every law involving the restraint of individual liberty or forfeiture of property as a penalty for crime is passed subject to the constitutional provision concerning clemency which must therefore be considered a part of the enactment.

The exercise of this discretionary, exceptional and unreviewable jurisdiction undoubtedly presents grave difficulties. The unhampered and uncontrollable nature of the power, its emanation direct from the people whose best general sentiment it should always reflect, the lack of formality in its procedure and its general effects upon society and individuals make the lot of its depositary no enviable one. This is especially so in states having the "one-man power." It is now generally conceded that some advisory body should hear applications and make recommendations to the executive before he acts, thus securing regularity, publicity and careful consideration.

Whether the power be vested in one or many, however, the governing principles, as well as the source and nature of data that should control, are matters of highest importance, quite frequently misconceived by the executive and generally not appreciated by the public. Every depositary of the power should remember that it is intended to be a supreme and plenary supplement to the inadequacies and imperfections of ordinary governmental procedure so far as it affects individual liberty. On the other hand, he should firmly determine to exercise it only when in obedience to a rational interpretation of common public sentiment the case by reason of inherent special circumstances raises a persuasive presumption that it was intended by the people to be excepted out of the general terms of the punishing statute.

There is no doubt that decision is capable of being rendered upon precise and unassailable grounds, since clemency is a definite jurisdiction with guiding rules productive of rational and just results from all standpoints.

When the executive has gathered all the data pertaining to the offender, the violated statute, the offense, the trial and the punishment, the important question arises whether the case calls for relief. If it is one that a dispassionate mind of honest intent is constrained

to believe would not have been included in the terms of the violated statute when it was enacted had the legislature known the facts or been imbued with later accepted views, then it is exceptional, and clemency should be extended so far as the exceptionality warrants.

In matters touching public policy, dealing with youthful offenders, habitual criminals, rehabilitation of "occasional" culprits, etc., the common experiences of life and the generally accepted views on criminology will not only justify action but frequently represent general public sentiment in advance of its being enacted into laws.

It is under this phase of the extraordinary jurisdiction that criticism is just now particularly noticeable. The whole country is engaged in reconciling the old and new theories concerning crime and criminals. It cannot be doubted that depositaries of the pardoning power have been very much affected by the revolution which for thirty years past has been remoulding the whole body of criminal law and awakening the social conscience to a new sense of responsibility for the existence of crime and the necessity of securing more adequate protection against malefactors. It has now culminated in the overthrow of that primitive and purely instinctive system which for some five thousand years was tried and found to be ineffectual. There is a general acceptance of the theories of criminology and penology which have been evolved by and proven to be consistent with the moral and intellectual advancement manifested in all other phases of community life.

The fallacy of the traditional vindictive punishment of criminals is recognized, the belief in its deterrent effect is exploded and the attempt to diminish crime by statutes fixing a definite penalty for a specified offence is admitted to be futile. Formerly, the symptoms of social distemper were never studied with a view to learning and eradicating the causes. Now, however, the doctrine is generally accepted throughout the civilized world that infliction of pain should be eliminated from criminal law as unnecessary and unwarranted and that criminals, being morally defective, are wards of the state, to be cared for in order to reform them if possible and in any event to prevent their becoming a menace to society. All of this is being widely and earnestly applied under the admonition: *Study the criminal rather than the crime.*

There remain, however, many constitutional and statutory evidences of the old theory, indicating that the present time is one of

transition. It is shown by the fact that Congress and legislatures still endeavor to create virtue and honesty by positive law while almost in the same hour they enact statutes based upon the individual study and treatment of malefactors irrespective of their offences, and create commissions to inquire whether certain industrial conditions or social relations tend to either physical impairment or moral degeneration.

The depositaries of the pardoning power have not escaped the influences of this general revolution. Until the laws are changed, the people can look for action consistent with modern ideas only to those who hold the great exceptional jurisdiction. None should shrink from exercising the pardoning power in furtherance of what is now a general public sentiment which promises much for the individual and for society. Only in this way can the will of the people be fulfilled and their good be promoted during the period of adjustment by legislative enactment. If the power of pardon is being abused today it is in the failure of executives to act upon their own motion and apply the rational theories of criminology to the many prisoners throughout the country who were years ago incarcerated under the system of rigid impersonal and mechanical criminal laws. An intelligent investigation would reveal that many inmates of prisons could and ought to be set free because able and disposed to take up their primary duties of contributing to the common weal and behaving with due regard to the rights of others. So, too, many might be discovered who would always be a menace to society and thus data be secured for recommending proper protective laws before their liberation. In any event there would be the opportunity for study of the criminal and for adopting such remedies as would tend to diminish crime.

No executive is bound to wait until an application for pardon is presented to him. His constitutional duty is to exercise his power rationally in all exceptional cases, for the state needs the coöperation of every normal citizen in the community life. In some states through penitentiary officials this work is already going on and in others the governors have had special investigations made and have liberated many prisoners.

There have been many instances when executives have felt impelled to utilize the untrammeled jurisdiction of clemency for applying these rational principles of criminology which by the slower

methods of legislation will in time be entrusted to the ordinary channels of the judicial branch of government. It cannot be done in a day, a year, nor in some states even in a decade, but it will be accomplished. The readjustment is going steadily forward and there is little doubt that in the near future the people of this great nation will at last fully emerge from the cloud of antiquity, discard the old cruel, useless and futile criminal laws and procedure and adopt sane, humane and rational measures for the protection of society from its defective members and provide for their proper care and reformation. Then every crime, when its perpetrator is discovered, will mean special study and treatment of the culprit according to enlightened methods and ends, and the pardoning power will change from an active function into an interesting historical tradition.

UNIFORM LEGISLATION IN THE UNITED STATES

By Walter George Smith,
Of the Philadelphia Bar.

Notwithstanding the advantages connected with the principle of local self-government, which finds its expression in the federal system, modern developments of commercial and social life have brought about obvious and grave evils. It is a commonplace that the form of government devised by the great men who drafted the Constitution of the United States was brought into being under conditions more dissimilar from those of today, so far as they related to trade and commerce, than those conditions themselves were to the period when Rome governed the world. A population less by a million or more than that which now crowds Manhattan Island and the shores of New York Bay, scattered along the Atlantic coast, with its outposts just beginning to cross the Alleghenies, constituted the people of the United States. They were for the most part of pure English descent, and the common law of the mother country was administered substantially without other change than the differences of a new country made necessary. The industries were mainly agricultural and maritime, and the disputed questions of state or federal jurisdiction, while of momentous importance, were indefinitely fewer than those which now command public attention. None the less, so well marked are the political principles upon which the federal constitution is based, so wisely had they been evolved in the minds of the early statesmen from the precedents afforded by the history of human government, that with comparatively few amendments they have been adapted to the needs of the states during all the memorable years from 1789 till the present day. The political systems of other nations that were contemporary with our own in 1789 have all passed away or been so modified that we may truthfully say that, while we are the youngest of the great nations, our government as it stands today with its checks and balances, its reserved rights of the states and delegated powers of the general government, is the oldest now existing.

The time has come, however, when acknowledged evils, not ap-

parent when our population was small and the mastery of the hidden forces of nature had not revolutionized habits of life, are pressing for solution. The apparent simplicity of conferring on the general government the full jurisdiction over matters of interstate commerce allowed by the letter of the constitution or which by interpretation can be brought under the spirit of its language, has led a large and constantly increasing number of political thinkers to advocate further amendments that will give jurisdiction in matters of more intimate local concern.

Needless to say, unless this tendency towards the magnifying of federal jurisdiction and minimizing of the states shall be checked, we shall find ourselves under an imperial system which, whatever be its advantages, is essentially bad and fraught with danger to American ideals. There would seem to be but one antidote for the evil of exaggerated federal jurisdiction and that rests in the principle of uniform legislation by the various states. Wholesale and many branches of retail business have long since ceased to operate within a single state, and if it cannot find relief from the divergent laws of the different states on the same subjects, it will demand and will receive the boon from a changed constitution.

Competent publicists have expressed the opinion that the machinery of the federal government is already clogged and overweighted. There are dangers to be apprehended from the further reducing of state jurisdiction which need not be enlarged upon. No citizen, proud of the success of our representative republican system, can witness its decay without sorrow and foreboding. The constitutional checks and limitations are the best if not the only safeguard of the rights of a minority and the surest defense against sectional legislation. If then it be possible to preserve them and yet permit the widest expansion of commercial activity, there can be no doubt that it is a patriotic duty to do so.

It is believed that the history and accomplishment of the Conference of Commissioners on Uniform State Laws will show the possibility of attaining substantial uniformity in many matters of commercial and social importance. The conference reflects in many ways the sentiment of the legal profession and, though a distinct body, is itself an outcome of the efforts of the American Bar Association to fulfill one of its declared objects, "to promote the administration of justice and uniformity of legislation throughout the Union."

Following the appointment of a committee composed of one member from each state by the association in 1889 to meet in convention and examine the laws of the different states, especially those relating to marriage and divorce, descent and distribution of property, acknowledgment of deeds and execution and probate of wills, with a view to bringing about uniformity on these subjects, the legislature of New York in 1890 authorized the governor to appoint three commissioners by the name and style of "Commissioners for the Promotion of Uniformity of Legislation in the United States" to ascertain the best means to effect an assimilation and uniformity in the laws of the states, and to consider whether it would be practicable to invite other states to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states.

Year by year since 1890 such a convention has been held. The commissioners have organized themselves into a permanent body with a constitution and by-laws, executive officers, and standing and special committees. All of the states, territories and possessions of the United States are represented, more than one-half by virtue of legislative authority and the others by the exercise of gubernatorial discretion. In 1913 there were present commissioners, representing thirty-five states and territories. The conference meets annually some days before the sessions of the American Bar Association and at the same place. Its members are almost entirely lawyers, and their work is customarily but not necessarily submitted for approval to the Bar Association through its committee on uniform state laws.

The method adopted for drafting the more lengthy acts offers every possible safeguard against hasty and slipshod legislation. The subject having been decided to be appropriate for uniform legislation by the conference, is referred to the proper committee with authority to employ an expert. The expert in due time submits his draft to the committee which, after careful revision, reports to the conference a tentative draft of an act. In some cases acts have been printed and reprinted with annotations and explanations several times, have been in all cases submitted to lawyers, professors, business men and corporation officials. Public meetings are held by the committees, and finally the draft act is approved and sent to the different states, through their respective commissioners, for adoption.

The most successful of the efforts to attain uniformity has been in the case of the negotiable instruments act. It was drafted by John J. Crawford, Esq., of the New York bar, an expert on the subject. He had for a basis of his work the English bills of exchange act of 1882, which had been the law of Great Britain and her various colonies for many years. In preparing this act the English draftsman merely sought to put in the form of a statute the law as found in the decisions of the courts, and where there was a conflict of decision to adopt the doctrine supported by the weight of authority. The act, after repeated redrafts, was finally offered for approval in 1896, and has since been adopted without much amendment in forty-six states, territories and the District of Columbia.

The Warehouse Receipts Act

This act was drafted by Prof. Samuel Williston, of Harvard Law School, and Barry Mohun, Esq., of Washington, D. C., an author of a work on warehouse receipts. This bill has met with acceptance in thirty states. The commercial importance of warehouse receipts and bills of lading has developed a systematic theory in regard to them, which had its origin in the custom of merchants. As stated by Professor Williston:

> The fundamental doctrines of the mercantile theory are the complete assignability of the document if it runs to order, and the complete identification of the document with the goods it represents. Both these doctrines are contrary to the ordinary common law principles.

The passage of this act makes goods in the hands of a warehouseman impossible of attachment, without the surrender of the receipt, or its being impounded by the court. Thus full negotiability is given to warehouse receipts, excepting that title does not pass where they fall into the hands of a thief. In view of the enormous values of all sorts of merchandise held in storage, the effect of adding these documents of title to the bankable paper of the country can be appreciated at a glance.

The Uniform Bills of Lading Act

This was finally adopted by the conference after five separate drafts had been printed and revised. Bills of lading are divided

into two classes, a non-negotiable or "straight" bill, in which it is stated that the goods are consigned or directed to a specified person, and a negotiable or "order" bill, in which it is stated that the goods are consigned or destined to the order of any person named on the bill. By this act the order bill becomes completely negotiable.

As was said by the chairman of the committee, Francis B. James, Esq.:

> By this act an "order" bill of lading is recognized as part of the currency of commerce, a piece of commercial paper, passing freely from hand to hand, so that a man may discharge his debt with a bill of lading as well as with cash, either in his relations to his banker or any other creditor.

and he quotes from Logan McPherson:[1]

> It is not only a certificate that merchandise is in transit, but a first lien upon that merchandise, in a way a title to ownership, and as fulfilling this function, negotiable. For example, a grain dealer bringing a car load of wheat at the western field may, and in the vast majority of cases does, deposit the bill of lading covering that car in a bank as security for a loan to its value. If that car goes through to a port where it is sold for export, the loan may not be paid and the bill of lading lifted until the grain is transferred from the car to the vessel. There is a similar procedure in the case of other commodities, with bills of lading covering raw material to the factory and finished product from the factory. The order bill of lading thus contributes to that fluidity of the circulating medium, that celerity in the transfer of merchandise, which are striking achievements and essential requirements of current civilization.

This act has already passed in eleven states and has been well received by the commercial community.

The Transfer of Stock Act

The scheme of this act is to deal with certificates of stock so that they become the sole and exclusive representative of shares of stock in the corporations which issue them, so that they may pass freely from hand to hand, and a bona fide purchaser for value of a duly endorsed certificate becomes at once the owner of the certificate and of the shares represented thereby. The essence of the act centers in section 8, which provides:

[1] *Railroad Freight Rates*, etc., p. 190, quoted 16 Pa. Bar Assocn. Rept. 114.

> Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby.

This act after four years of preparation was approved by the conference in 1909 and has thus far been passed in nine states.

The Uniform Sales Act

The last of the more important commercial acts prepared by the conference. This act, also drafted by Professor Williston, is based upon the English sale of goods act drafted by M. D. Chalmers, an eminent English judge and jurist, who also drafted the bills of exchange act upon which the negotiable instruments bill is based. Judge Chalmers says of his act:[2]

> Sale is a consensual contract and the act does not seek to prevent the parties from making any bargain they please. Its object is to lay down clear rules for the cases where the parties have either formed no intention or failed to express it.

As has been shown by Professor Williston, it is an advantage for any subject to be reduced to simple rules, and is convenient both to business men and to lawyers. This reason has induced England to pass various commercial acts, and in our country the reason is accentuated by our divergent jurisdictions. The mercantile view has been adopted in this act as relates to documents of title, giving them the fullest negotiability rather than the restricted view of the common law. The act has passed in eleven states.

The five acts, known as the American uniform commercial acts, are the most important outcome of the deliberations of the conference, and their acceptance by so many states shows the commission was not mistaken in selecting them for uniform codification. They have besides, with the exception of the stock transfer act, all been approved by the National Civic Federation.

[2] Preface to sale of goods act, 1893.

The Execution and Probate of Wills

Acts have been prepared upon this subject which when adopted will remove dangers that have not infrequently resulted in defeating the obvious will of the testator leaving property in different jurisdictions. Nine states have adopted the act relating to the execution of wills without the state.

Of equal importance with the commercial acts, though the object in view is much more difficult of attainment, is uniformity in certain matters of social importance. The scandal arising from the divergent laws of the different states, especially on the subject of jurisdiction, brought about the enactment of legislation in Pennsylvania which resulted in a congress being held in Washington in 1906 to correct some of the evils and anomalies of the existing divorce statutes. This congress met at the invitation of the governor of Pennsylvania and its expenses were paid from the treasury of that state. It drafted the uniform divorce law.

Uniform Divorce Law

This would correct the more obvious evils of the existing system and especially the extraordinary situation presented in an occasional case where a divorce is held valid in one state and invalid in another, with the result that a man may be legally married to two wives and have two sets of legitimate children because neither jurisdiction recognizes the validity of the other's judicial decree. The uniform divorce act prepared by the congress was considered by the conference of commissioners as being so excellent a measure, especially as it embodied the principles of divorce reform enunciated by the American Bar Association, that the act was accepted by the conference and approved as one of its own. This act does not attempt to regulate details of procedure, and such details with but few exceptions are left to the different states to formulate as they may deem proper. The principal exceptions are those relating to open public hearings and the publicity of records of divorce cases which the states are urged to embody in their laws. No attempt has been made to bring about uniformity of causes for divorce, it being felt that each state could regulate this matter in accordance with the prevailing public sentiment; but on the general subject of the jurisdiction of the courts to grant decrees of absolute divorce and the recognition

or effect to be given in one state to decrees of divorce obtained in another, careful legislation is recommended.

The sections relating to jurisdiction require a bona fide residence of one of the parties in the state for two years before the bringing of an action, except in case of adultery and bigamy when the cause of action arose in the state, and a like term of residence of one of the parties when either has become a resident of the state since the cause of action arose, providing that in the latter case the cause of action must have been recognized in the state in which such party resided at the time the cause of action arose as a ground for the same relief asked for in the action.

Migratory divorces are cut up by the root and the scandal arising therefrom will be practically eliminated by the provision that "if any inhabitant of this state should go into another state, territory or county in order to obtain a decree of divorce for a cause which occurred while the parties resided in this state, or for a cause which is not a ground for divorce under the laws of this state, a decree so obtained shall be of no force or effect in this state." This is the law of Massachusetts.

When jurisdiction has been obtained in accordance with the provision of the act and a decree has been entered, then it is provided that "full faith and credit shall be given to a decree of annulment of marriage or divorce obtained in another state when the jurisdiction of the court was obtained in the manner and in substantial conformity to the conditions prescribed by this act."

It is not claimed by the advocates of the uniform divorce act that its passage will materially diminish the number of divorces, but it will remove much of the scandal connected with them and is the best that can be done so long as public sentiment favors absolute divorce under any circumstances. It is a mosaic made up of existing provisions of the laws of many of the states and has been adopted in principle in New Jersey, Delaware, Wisconsin, and is substantially the law of Illinois. There has been a mistaken impression that it contains notional provisions, the outcome of merely theoretical knowledge on the part of its draftsmen, but in point of fact not one of its provisions has been untried.

The Uniform Marriage Act

This act leaves to each of the states that adopts it the selection of the persons who may celebrate the marriage ceremony. Its central thought is that no marriage may be validly contracted until a license has been issued, and then that the parties must declare in the presence of at least two competent witnesses other than the officiating person that they take each other for husband and wife. A period of five days must elapse between the application and the granting of the license. Marriage according to the rules of special religious societies is provided for. Common law marriages will be abolished by all of the states that adopt this act. They are no longer valid in a dozen or more of the states. This act too is based upon the existing laws of various states. Its draftsmen have sought to avoid the mistake of making marriage difficult and at the same time have sought to surround it with every practicable safeguard.

The Evasion of Marriage Act

This provides that marriage celebrated between citizens or a citizen of the state in any other jurisdiction contrary to the laws of the domicile shall be null and void. The passage of this act will be necessary in order to prevent the evasion of the laws of any state passing the marriage act, as otherwise citizens could go into other jurisdictions, marry and return to their domicile, thus avoiding its requirements.

The Wife Desertion Act

This act was inspired by the law of the District of Columbia which has been in successful operation for several years. It provides for the trial and sentence of wife deserters and parents who leave their children in destitute circumstances, with provisions that make it possible for the court to suspend sentence if the offender is willing to work outside of jail, and if not he is compelled to work in jail and his earnings are turned over for the support of the deserted wife or children, as the case may be. The substantial provisions of this act have met with general acceptance.

A Uniform Child Labor Act

Embodying the best principles that study of the subject has educed. It has been adopted by the conference and has been used as a model in various of the states.

Workmen's Compensation

This difficult subject has also been carefully studied and a tentative act covering the best learning on the subject has been drafted.

This sketch of the work of the Conference of Commissioners on Uniform State Laws can give but an imperfect idea of its activities. It is absolutely non-political, sufficiently conservative, and, considering that the bills recommended by it have no greater sanction than their own excellence, their general acceptance has been very encouraging. It is believed that this plan of obtaining uniformity has passed far beyond the experimental stage. As the legislatures of the different states get a better realization of it, they will appropriate adequate sums for its support. At present all of the commissioners work without compensation, and a large proportion of them pay the not inconsiderable expenses attendant upon their presence at the meetings at long distances from their homes. Many of the states, however, not only pay the expenses of their commissioners, but a proportion of the expenses of the conference itself. These contributions, together with the aid of the American Bar Association, have enabled it to meet the very moderate requirements of expert fees, printing bills and other necessary demands.

At a time when the critical spirit of inquiry is searching the very foundations of our civilization, and the boldest schemes for attaining Utopian conditions find fanatical advocates, a sober spirit should be cultivated especially among those who are charged with the responsibility of legislating for the community. It is necessary, of course, that legislation should meet changing conditions, but the general principles upon which such legislation should be drafted have been settled by the experience of many centuries, and those who would seek to prove them to be based on false principles should have the burden cast upon them at every stage of argument. Men are not made moral by legislation nor by secular education. Every measure of change or reform should be submitted as far as possible to the passionless examination of experts. It is believed that the work of the Conference of Commissioners on Uniform State Laws shows the value of such methods.

ORGANIZATION OF THE BAR

By Herbert Harley,

Secretary of the American Judicature Society, Chicago.

Lawyers have made a spirited fight against the recall of judges. They will soon have to face a popular demand for a limitation upon the right of advocacy which will mean for most of them neither more nor less than the recall of lawyers.

Over-contentiousness is the all-inclusive definition of present difficulties in the administration of justice. Contentiousness has exceeded all reasonable bounds because of encroachments upon the authority of an elective judiciary and because of the lawyer's tremendous personal interest in litigation. Most litigation is conducted by lawyers attached to a few clients upon whose favor they are in large part dependent for their living. Often the lawyer's interest exceeds that of his client. Ordinarily his allegiance to his client is greater than his loyalty to the court. It is an instance of practice in conflict with theory.

The line of argument is short and straight. To many minds it leads directly to the conclusion that the way to judicial efficiency lies in attaching the advocate more closely to the court and severing his intimate relationship with his client.

To accomplish this it is proposed that advocacy be restricted to an "official trial bar," the members of which would be paid solely from public funds.

At present the lawyer's connection with the court is one of extreme tenuity. His relation to his client becomes constantly more intimate. All large interests keep lawyers just as they keep accountants, auditors, purchasing agents, and so forth. The proposed change simply goes to the limit on the other side. It makes the lawyer's relation to his client perfunctory, his relation to the court of the most intimate sort.

It is a curious fact that the proposal that an official trial bar be created as a sort of poultice for weak-backed courts comes from the bar itself. The idea will have vastly more support from individual lawyers, it is already evident, than has the judicial recall.

That it will take well with the radical press is a foregone conclusion. In fact one of its first appearances in two-column editorials evoked the expression "Free Justice" which well may become the slogan for this radical wing.

It may be assumed that the greater part of the bar will scent danger and rebel against this threatened swing of the pendulum to the opposite end of the arc. We already hear them citing Pliny and Tacitus and declaring that the idea of a trial bar is no new thing.

What sane middle ground is there for the conservative lawyer? He will admit that today the lawyer has too great a stake in decisions but insist that the almost complete removal of personal interest would make courts weaker at a time when they should be stronger.

Efficiency in the administration of justice implies control by the courts and self-discipline on the part of the bar. The former alone could not suffice for the lawyer has many functions over which the court can have no direct supervision. There must be built up for both counselor and advocate a powerful inhibition against the violation of ethics. Much stronger courts could compel outward compliance with necessary rules. But real reformation of the bar must be of the very spirit of the institution. It must begin within and work out. It must be the result of a new and larger self-interest, a self-interest which embraces the entire profession.

The bar has its share today of conscientious members. How is the conscience of the sensitive to become the conscience of the entire bar? Only one way is possible. It must come by welding all the lawyers of a state into one closely knit organization. Given a genuine organization the sentiment of the majority will speedily control the conduct of all.

There are three reasons for having any organization of lawyers. First, for political purposes, employing the word in its larger meaning; it embraces discussion of proposed legislation, the development of procedural law, and possibly the exercise of influence with respect to the selection of judges. Second, for social intercourse. For both of these needs organization must be on a voluntary basis.

Third, for the government and self-discipline of the bar, including admission to practice, standards of education, suspensions, and involuntary retirement. Such purely fiscal work as the reporting of decisions, or any other work which affects equally every member, may be properly included in this classification. But for this third field voluntary organization is wholly ineffective.

The bars of the several states and of the Union have existed long enough to prove what can be done through voluntary organization. They take care well enough of the social and political needs. They fail sadly in the third field, that of self-government. Voluntary organization must always be partial organization. At the present time it does not extend to more than one-fourth of the entire active profession.

If there is to be self-government of the bar there must be organization of an authoritative sort on a democratic basis. There must be no member left out of the sanctuary. Membership must be inseparable from the privilege of practicing law. For every lawyer one vote in the government of the bar must be the simple, broad, principle of association.

All that is necessary is to incorporate the bar of a state, provide simple machinery for executing the majority will, and give to the organization certain reasonable responsibilities, such as determining educational requirements, conducting entrance examinations, fixing standards of ethics, and enforcing them by suspension or removal.

A minimum of effort is required of the membership for it can be provided that officers and a board of governors shall be elected by mail and that they shall report all their doings fully. The expense can be kept very low.

There are too many lawyers by far. In most states we have left competition to regulate numbers as if nobody were concerned but the lawyer. Unrestricted competition has its share of blame to meet for it has made tenderness of conscience a burden and bluntness of conscience an asset. It has put a premium on sheer will power and has handicapped intellect.

While old practitioners, many of them competent to grace appellate courts, have to do the work of beginners to make a living, the latter are subjected to a starvation test. There is a form of riddance but it is blind. It weeds out the good with the bad. It puts a premium on sharp practices. Too often those who refuse to stultify themselves are forced out and just as often those who make terms with their self-respect are rewarded by success.

Open competition implied by easy admission makes it a topsy-turvy profession. There is a survival of the fittest but the specifications of fitness are wrong. There is absolutely no danger from the standpoint of the public that there will ever be a shortage of

lawyers. If there were but one-third as many as now, that one-third, assisted by non-licensed apprentices, would readily supply all needs.

There is but one way to restrict the number of lawyers and that is to make the examinations for admission more difficult. Applicants cannot be given a moral grading, though of course some attention must be paid to morals to bar the few who are evidently unfit. It is in after years, under the pressure of competition, that the conscience becomes dulled. If it be true that wickedness is after all only stupidity, the lawyer obtained by intellectual selection can better be relied upon to maintain the honor of the profession than if the attempt were made to plot the moral curve of each applicant in advance.

Selection of new material will always be the large duty of the profession, but just at present the elimination of the unfit, or their sufficient disciplining, looms big. One of the things all self-respecting lawyers have desired is means for ridding the profession of those who bring discredit upon it. If the power existed it would need to be exercised but seldom. The problem has proved altogether insuperable for our voluntary bar associations with their limited membership and frequent change of officers. The vantage lies with the rascal. The worthy lawyer shrinks from the uneven conflict. His self-interest bids him pass on the other side. Were he linked up by law with the shyster and made responsible as the fellow members of an organization must be responsible for one another, his self-interest would lie in enforcing compliance to reasonable standards.

Just as sure as the majority of the profession is afforded a means for expressing its will with respect to its membership, just so certainly will this majority raise the standard of all to its own standard.

At present the lawyer has little to gain and much to lose by vigilance work. Rational organization will invert the terms of the equation.

The present organizations of the bar comprise the American Bar Association and forty-seven state bodies, besides those formed in the District of Columbia, in the island possessions, and those existing as city or county organizations. In all of them membership is voluntary and loose. There is but little working affiliation between these bodies though the similarity of structure is striking, and

the American Bar Association does act *in loco parentis* to the state bodies.

If it be assumed that the present associations remain unaltered to fill the rôles for which they are well calculated, and organization proceed independently on the thorough, democratic, and corporate basis, there will be little or no need of the coördination of all the state bar incorporated bodies. The need for coördination between the states, through the mediation of a central national body, is on the social, political, and voluntary sides. There is at present a strong indication that such coördination will soon exist. It is afforded by the need for recasting the American Bar Association, due to its rapid growth, which makes the present unwieldy form conspicuously inefficient. This need is reflected in a resolution adopted at the Montreal meeting of 1913 which created a committee charged with the duty of recommending changes in the constitution.

Thorough coördination with the state bar associations implies the control of the business of the American Bar Association by a congress of delegates representing the state bodies on a proportional basis.

The need for solidarity was emphasized by the recent fight against the judicial recall. The coming struggle against the recall of the lawyer from his quasi-judicial position as advocate will further call for solidarity. At present the bar has only an opportunity for agitating. Even this right is lost if the bar be seriously divided on a proposition. It is absolutely necessary that it have a means for settling questions of discipline in the only way that questions can be settled, by voting and by holding the minority to the result of the polling.

This genuine organization is likely to come about as a local movement, in one state after another. To have the idea accepted by the American Bar Association and encouraged by this parent body, would go a long way to facilitate its adoption. The American Bar Association has concerned itself with uniform legislation for the states; has framed a code of ethics; established a comparative law bureau; fathered an association of law schools, and done other things calculated to benefit the public, including the campaign against the judicial recall, but itself it has thus far not sought to benefit directly

The need for solidarity and self-government in the bar is one of the reasons for the organization in 1913 of the American Judicature

Society, the only lawyers' organization devoted frankly and exclusively to the promotion of efficiency in the administration of justice. The society proposes to draft a model act for the organization of the bar. Other model acts, looking to the reorganization of metropolitan and state courts on an efficiency basis, will be drafted, submitted to a selected council of representative lawyers in all the states, and then be presented in final form to the people and their legislatures.

Popular interest in judicial reform has outstripped popular experience and knowledge. The question is foremost among national problems. Public opinion has been aroused to such a degree that action of some sort is imminent in many states. But the bar through its voluntary associations has reacted in feeble and uncertain terms to the popular demand, or has set itself in opposition to flagrantly unwise propositions. There is obvious insufficiency of counsel based upon comparative study. The organizers of the American Judicature Society, embracing some of the most eminent minds in the profession, hope that the organization may prove to be the logical response of the bar to the present insistent need for guidance.

CRIME—FROM A STATISTICAL VIEWPOINT

By John Koren,

President of American Statistical Association, Boston, Mass.

Let no one be deluded by the superscription. It is not intended to exhibit a statistical picture of the conditions of crime in the United States. That demands an extensive knowledge of the facts which no one may profess to have. The humiliating truth is that statistics of crime, in the proper sense of the term, are largely an unfamiliar commodity in this country. This does not signify indifference about crime matters. We talk a great deal about them. Statutes are piled upon statutes in effort to prevent and punish criminality. Huge and costly experiments are undertaken for the reformation of offenders. There are even some who fearlessly, if not always wisely, seek to probe the crime question in its causative relations. Yet the fundamental facts in regard to the whole situation are lacking; we are not in position to take adequate stock of the problems we set ourselves to meet.

In general the purposes of criminal statistics are: (1) To furnish a measurement of the volume of crime during a given period; (2) to present the facts in regard to the different manifestations of criminality and the different classes of criminals; (3) to exhibit the judicial methods by which crime is dealt with; and (4) to serve as a basis for intensive study of specific phases of the crime question. The ultimate aim is to acquire a solid body of facts upon which to base intelligent action. Now let us examine in some detail the available statistical evidence about crime and see how far it meets the modest requirements stated.

For the United States as a whole, the decennial census enumeration of prisoners is the main source of knowledge. But no matter how painstaking such an enumeration is and how intelligently the results are presented, only that portion of crime comes under view for which men are finally convicted and sentenced to imprisonment. Manifestly, such a census reveals nothing in regard to the thousands who, although found guilty, escape further penalty through the payment of fines, by suspension of sentence, by being placed on proba-

tion, etc. Nor do statistics of prisoners afford the slightest inkling of the multitude of criminal cases coming before the courts in which the accused are not convicted; yet these must be considered in any effort to measure crime quantitatively. The truth that a country-wide census of prisoners does not provide the facts needed is particularly forced home when the census report through various untoward circumstances is published several years subsequent to the period of time it covers. Statistics of prisoners have their important place, of course, but are diminishing in value unless supplemented by other information, owing to the modern tendency of substituting new methods of dealing with crime for incarceration.

The field of criminal statistics does not promise a richer harvest within the area of single states. Most commonwealths have nothing to offer beyond wholly inadequate returns of prisoners to be found in institutional reports or brought together in some publication of a state board. Here and there effort is made to supplement such fragmentary information by certain facts obtained from the records of the criminal courts. But the scheme followed is either so crude or the facts are so badly put together that the whole output is of little use. One reason for this is that the duty of collecting and publishing statistics of crime is placed where it does not belong. Why, for instance, should it be assumed to be the proper function of a secretary of state, as in Ohio and New York, or of a board of charities, as in Pennsylvania? Only two states have so far provided special machinery for the purpose. Illinois has its new bureau of criminal statistics which, however, has only been in operation a short while. In Indiana, the long established bureau of statistics should prove equal to the task because it is backed by ample authority in law; but it suffers from that inefficiency which is almost necessarily associated with an office demanding technical training and skill, but whose head is elected by the people like any other political candidate!

With rare exceptions, the criminal courts do not attempt to enrich our knowledge about the crime situation. Apparently, they do not feel the need of informing themselves by bringing together and studying the results of their own work, much less do they recognize the general utility of enlightening the public with the facts. One court forms such a notable exception to the general rule that it deserves special mention, namely, the municipal court of Chicago.

Once in a while, under stress of special circumstances, officials may be forced to institute a statistical self-examination, as, for example, in the case of the municipal courts of Boston, and the results are singularly illuminating.

But, by and large, officials of the criminal courts seem to regard it as something akin to impertinence that students should wish to utilize their records as an educational means about matters of crime. Anyhow, these precious sources of the most fundamental knowledge generally remain sealed.

In a well-ordered community, the statistics derived from the records of the criminal courts should be supported by those pertaining to the work of prosecuting officials; but how reluctant these elective functionaries are to take the public into their confidence is well known. Very few of them vouchsafe as much as a superficial account of their work in the form of an annual report. Exceptionally, the report of an attorney-general may be found which, in obedience to some statute, presents fugitive and undigested facts about criminal prosecutions in specified criminal courts. They are raw totals, not qualified statistics.

There remains to be considered one other possible source of information of a general nature about the conditions of crime, namely, the records of the police. These are ordinarily translated into tables given out in annual reports, but not always. There are cities in this country of more than 200,000 population which do not publish any police reports whatsoever, or do it irregularly, or are content with a few typewritten pages of tables that are hardly intelligible even to the initiated. There is, of course, no standard for our police reports. Many of them are so questionable as to matter and so impossible as to form that they are robbed of the most primitive utility. An exceedingly small number offers material so complete that it can be used and interpreted without misgivings.

Let us therefore admit however reluctantly that statistics of crime in the true sense of the word we have not. This condition may not deter adventurous minds from parading figures purporting to show the "movement of crime" and many other things. If they are content to argue on such slender evidence as prison reports, newspaper clippings and the like, let them take the responsibility. No one who has mastered the rudiments of the application of the statistical method to the general crime problem can have the temer-

ity to venture far-reaching deductions on the strength of available information.

What underlies the situation? Merely indifference to the importance of knowing elementary facts about one of our greatest and most difficult social problems, or have we here only another instance of official neglect? To put the blame upon the federal government for not producing acceptable statistics of crime has become a habit even with some people who should know better. Doubtless, the government should be far more active than it is; but under our dual form of official existence, a bureau like that of the census is greatly handicapped in collecting criminal statistics. Not commanding any of the sources of information, it must depend upon the material available in the different states. For example, the federal government cannot compel returns in a specified form from the various criminal courts (the most important means of knowledge), and since such returns are not centrally assembled by the states, it is confronted by the enormous and almost prohibitively expensive task of sending its own agents through the length and breadth of the land to collect the facts where they are originally entered. An added difficulty is that the records to be consulted are often imperfect, have not in any sense been standardized, thanks largely to the diversity of criminal codes and court systems, and seldom meet a modest minimum requirement in regard to raw material from which criminal statistics may be obtained.

But when all allowances are made for the inactivity of federal and state authorities, let us say honestly that the root-difficulty is that we do not fully appreciate how necessary to intelligent legislative and practical endeavor it is to have systematically collected and thoroughly sifted facts about one of the most pressing and obvious problems common to the whole world. Is this not rather characteristic of us as a people? A learned man discoursed the other day upon the predominance in this country of the feminine type of mind, one manifestation of which is a disregard for fact, or at least for the painstaking assembling and comparative examination of facts. To be sure, it is a national habit to demand the facts about all manner of things and conditions. But we show little patience about working for them. Or we want to use facts merely as a spring-board from which to jump at conclusions, or facts are sought that shall point a theory. Perhaps this is what led Dr. Crothers to make

his celebrated remark about statistics as "the most useful fertilizer for the product known as fallacies."

The writer has no delusions about the magic of statistics as a solvent of our problem. It is merely a method of finding out about things; and the burden of this article is that we are not yet thoroughly alive to the necessity of knowing the facts about the crime situation. While this condition prevails, little is accomplished by examining what there is of statistical material unless it were to puncture the spurious articles which too often pass current. There are, however, distinctly hopeful signs. The topic of criminal statistics has come much to the fore in recent years. Organizations like the American Institute of Criminal Law and Criminology are actively pushing it forward. Best of all, the bar and the judiciary are beginning to recognize the need of systematic information about their own work. Mention was made above of the recent establishment of a bureau of criminal statistics in Illinois. Massachusetts is considering a law charging its efficient bureau of statistics with the duty of gathering criminal judicial statistics. In other states, the subject is receiving more or less attention.

At least it has become recognized that we cannot be content merely with returns from prisons, and that we must look to the records of the criminal courts as the best sources of knowledge. To be sure, even when these are fortified by police and prison reports, they do not provide a perfect instrument even for measuring crime quantitatively; but they can be made to meet all practical requirements. They should help us to an understanding of the different manifestations of criminality and of the different classes of criminals. Above all, the immediate need would be met for accurate information about the instrumentalities whereby we seek to repress crime, foremost among which are the criminal courts themselves. Are the systems and methods in vogue wholly adequate? Do our long-standing theories upon which they rest prove themselves by the results? It is not asking over-much that such simple questions should be answered.

Of the different items that go to make up competent criminal court records there is not space to speak in detail, except to say that such records must give an account of the judicial process and of the human element in each case. It is more worth while to emphasize that the situation will not mend if we rely solely upon the federal government to provide us with statistics of crime. Each state must see to it

that the federal government is placed in position to do its work. The collection of vital statistics furnishes an analogy. Not until each state passes an adequate law for the registration of births, marriages and deaths and makes it effective, can the federal bureau in charge gather for that state vital statistics. The federal government can, however, pave the way by instigating legislation, by directing attention to the subject and by affording practical demonstrations.

A consideration of the wider applicability of criminal statistics, how necessary they are to different intensive studies, etc., is beyond the scope of this article. First let us acquire the elementary facts and then it will be timely to speak of their refinements. Meanwhile, the most necessary, if somewhat disagreeable task, is to hammer it into the consciousness of those concerned with the crime question that we grope blindly so long as we are without the guidance of accurate knowledge, not only about the extent and manifestations of crime, but about the very means by which we try to stop it. The European finger of scorn has long been pointed at us, even if in polite disguise, for our neglect to inform ourselves in this respect. True, we labor under difficulties from which other countries are spared, but it is frankly humiliating that we do so little to overcome them.

There is much crass ignorance about crime, and some are prone to grow hysterical over it. But does the popular notion about a rampant criminality in this country, about ineffective means of repressing it, of a prostitution of law whereby offenders escape, square with the evidence? It is vital to know the truth. Some day we shall arrive at the dignity of exhibiting it in orderly array, and no longer be dependent upon a newspaper for statements in regard to the rate of homicide in the United States. Meanwhile, one can at least write safely about crime from a statistical viewpoint without producing any statistics!

CRITIQUE ON RECORDING DATA CONCERNING CRIMINALS

By William Healy,

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To a student dealing with the practical aspects of criminalism it appears quite patent that almost no assistance towards solutions, general or in the individual case, is to be derived from the type of data officially recorded concerning criminals. And not only in the attempt to discern actual means of halting or forfending criminal careers is this inefficiency of accumulated fact perceived, but also it is evident that the people of the law, whether engaged in the administration of police, penal or court affairs, feel themselves in nowise influenced by the statement of collected figures. In fact the criminal law itself has not been modified to an appreciable extent by any growth of learning or experience that one might expect to find centering about actual observation in its own field. In this certainly there is wide divergence from latter-day advance in other arts, sciences and professions.

This astonishing lack of impulse to progression from observational data does not characterize our country alone. The German scholarship which in recent years has been deeply concerned with proposed reform of the entire criminal code, finds almost no reason to even refer to such data as may be found, and the discussion still nearly all turns upon theoretical considerations—it is the philosophy of ethics, of crime, of punishment, even as conceived by the ancients, which is thrashed over and over. The fact is that data at all adequate for showing the road to better things, notwithstanding European supremacy in statistics, are still lacking, there as here.

One might well consider if our remarkable national innocence of criminal statistics is not considerably due to a vague, half-formulated and rather shrewd conception of *cui bono*. We have not been so slow about undertaking studies of many other matters of public welfare, or of vastly less costly departments of governmental administration. Realized or not, however, it is the truth that the collection of mere general figures concerning conclusions leads almost no distance along

the road to betterment of the situation. Since nationally we have nothing but the barest census statistics—those only by decades—and nothing much better in local reports, let us look at the carefully worked-up English judicial statistics, readily obtainable by all readers, and published for each year. There we find matters set forth which ought to arouse immense public interest, but yet which entirely fail to do so. Partly, one might think, because of no showing that things are not as they have been for generations past, but probably mostly because the figures do not show the slightest indication of any solution of the difficulty, such as at least might be suggested by comparative statistics relating to labor, agriculture, transportation, and so on.

Letting alone the collection of figures in this *Blue Book* by localities and courts and months and crimes, which cover many large pages, and which are of use, if at all, mostly for administrative adjustment, some larger issues are clearly presented. Take the question of *recidivism*, to my mind one of the three or four cardinal points of criminalism. We have this set forth in startling array, and as we would like to see it worked up for America. But what does this recidivism mean, and from these naked statistics what possible clue is there to what can be done about it?

From such figures questions of efficiency may well be raised, efficiency of court procedure, of penal and reformatory institutions. Of course it is on just such statistics as these—20 per cent of 168,000 prisoners convicted upwards of ten times previously—that efficiency studies may be urged, but no fair answer is in anywise forthcoming from the mere statement. Take your Elmira Reformatory "graduates," and study the outcome of efforts made during their institutional life. What do individual findings or total figures mean, if no account is taken of causes of either earlier or later success or failure, if no estimation is made of the qualities of the human material that was treated? No judgment in the realms of criminology is possible without knowledge of mental and physical capacities and stresses, as well as the bare facts of law breaking.

Fundamental for the development of that systematic recording of data concerning criminals which shall prove really valuable in indicating any way out of the costly failure of our present methods, is the assuming of a business-like and scientific attitude towards the whole matter. Where such tremendously varying units are the ac-

tive members producing the given result, the individual characteristics and possibilities of groups into which they may be classified must be made the subject of study, if one is to determine the cause and probability of success or failure. This is the method of today in scientific and industrial fields. The fact of failure and cost we know, not so well as we should know it if we had statistics, but the bare fact affords only a peep into the problem.

If we made a business-like approach to criminalism we should first ascertain who and what proportion among criminals have the innate ability to meet ordinary social conditions without falling by the wayside, and who have not. Then proceeding from that practical line of demarcation, all sorts of studies might be made of why those fail who have the innate capacity to succeed; and, particularly, inquiry might be made concerning what might be done about individuals or groups to prevent or deter. If England, for example, was to undertake such a studious survey of the individuals who make up its criminal class, and particularly its youngest offenders—following in this the recent recommendations of Goring and Ruggles-Brise, based on the splendid scientific work of the former, who shows the emptiness of considering the criminal as a type—it would do more to show the way to clearing the courts than centuries of yearly presentation of statistics.

What is needed to be known about criminalism is causes, and these are only to be ascertained by individual study. Causes in general have been theorized over, and all to little end. Seeing through the futility of theory, and dogma, and laws based on ancient preconceptions, we can only look forward to development of a scientific study of the salient particulars of criminal genetics as they may be actually found in the lives of men, especially through the sizing up of the criminal himself.

Nothing can possibly be of such value for the establishment of sound general social measures, doing justice to the offender and protecting society, as these estimations of the essentials of the problem, which even common sense would seem to dictate.

If data are worth accumulating at all they should bear practical fruit. To go on getting the type of facts that have thus far been officially registered, simply because they can be fairly readily obtained, irrespective of any ultimate value, is an archaic proceeding long proved unavailing in this field. More facts on the same lines

is heaping Pelion on Ossa—it is a new type of fact that the situation demands. Careful research is required and there perhaps rests the crux of the situation.

At the time of our developing, four years ago, a schedule for recording data (for the purposes of our own institute primarily, and then as a bulletin widely distributed by the American Institute of Criminal Law and Criminology) we could find no center where facts adequate for the understanding of individual cases and causes were being registered. At present there are a number of places in this country where studies concerning individuals and genetics are being gradually accumulated, but the public demand for such has not awakened. In a second bulletin issued last year by the same American institute, in which we dealt with the more practical phases of recording data, the problem of uniformity of record was discussed. Until the need of making adequate studies of offenders and causes is realized there can be no uniformity—not even a minimum schedule will be of use, for no statement can sufficiently explain for practical adjustments, which does not include competent estimation of the capacities of the individual.

We have been purposely avoiding in this discussion the important recording of data for identification. That belongs to another field; it is first of all a police affair, but it inevitably underlies the development of much scientific and reformatory work. Your intelligent professional criminal will tell you this, and that the situation, as far as society *vs.* the professional is concerned, is largely impotent, because he is today one man in Illinois and another in Pennsylvania tomorrow, and no one is the wiser.

One of the best representatives of this professional class of students of practical criminalistic affairs, asserts confidently that until the central government undertakes thoroughly to study criminalism, and to record important data thereupon, neither constructive nor disciplinary measures effective enough markedly to mitigate many types of criminalism will be possible. This is also our opinion.

THE EVOLUTION OF OUR CRIMINAL PROCEDURE

By Samuel Scoville, Jr.,
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Criminal procedure in this country is passing through its age of unreason.

Our forbears were a grim and hasty folk "readier to ban than to bless," who had to fight hard and endure much for their scanty possessions in the Northland. They accordingly brought down into west-over-the-sea, the Viking name for England, an exaggerated regard for property and a contempt for human life. This is reflected in their laws. Under them a man's life was not worth more than two shillings nor as much as a sheep, a pig, or a hay-stack. On April 21, 1824, at Bury St. Edmunds, Thomas Wright and Robert Bradnum, both aged 26, were hung for stealing a live, fat pig. In 1833, a little boy nine years of age pushed a stick through a broken window and pulled out some bright-colored paints worth two pence. He was condemned to death for burglary. On April 25, 1839, William Cattermole was hanged at Ipswich for setting fire to a stack of hay. Cutting down a young tree, impersonating a pensioner, stealing linen left out to bleach, defacing a county bridge, and two hundred and nineteen other offenses were punishable by death until 1837.

The procedure was as harsh as the laws. Indictments were drawn in a language which the accused could not read, and frequently he did not know with what crime he was charged until the day of his trial. He was not allowed to testify in his own behalf. His witnesses were not allowed to be sworn and their evidence naturally had but little weight. If accused of treason or felony, his counsel could not even address the jury. When, in spite of such tremendous odds, an accused man had enough ability and natural eloquence to combat successfully the able lawyers for the crown, and persuade a jury to acquit him, the members of this jury might be fined and imprisoned. This happened in the case of Sir Nicholas Throckmorton, who was prosecuted for high treason in 1554. Single-handed against a hostile judge and the best lawyers in England, he fought for his life and won. The jury who acquitted him were

severely punished. This was fatal to his brother who was tried later and who on the same evidence was convicted by another jury which had heard of the fate of the first. If the accused was convicted of murder, he had no right of appeal. If acquitted, the crown might take an appeal. The Norcott trials in 1628 showed the horrible injustice of such a system. In that year a woman named Jane Norcott was found lying in her bed with her throat cut while a bloody knife was found sticking in the floor. Her mother, sister and brother-in-law, who slept in an outer room, testified at the inquest that no stranger came in during the night to the best of their knowledge. On the strength of this statement, they were suspected of murder. The first coroner's jury brought in a verdict of suicide. This was not satisfactory to the court at assizes and after thirty days, the body was disinterred and a second inquest held. On this inquest, a verdict of murder was found against the defendants and they were tried at Hertford before a petit jury and acquitted. The judge was dissatisfied with this verdict and accordingly recommended that the infant child of the dead woman should be made plaintiff in an appeal of murder against its father, grandmother, aunt and uncle and the appeal was tried accordingly. Before a second trial, the four defendants were compelled each of them to touch the dead body and witnesses testified "that when the four accused laid their hands on the corpse, the brow of the dead which before was a livid and carrion color, sweat. That the sweat ran down in drops on the face, and that the corpse opened one of its eyes and shut it again repeating this three times, and likewise thrust out the ring finger three times and pulled it in again and that the finger dropped blood on the grass." On this evidence, the defendants were convicted and hanged.

The punishments were as bloody and as barbarous as the procedure. In cases of treason the convicted man was partially hanged, cut down and disemboweled and while still alive his entrails were burned before his eyes. Women guilty of the murder of their husbands were burned at the stake. Coiners were boiled alive. Suicides were buried at crossroads with a great stake driven through the heart.

In this welter of blood and punishment, with all the odds against an accused, the judges began to insist upon the observance of every technicality. Precedents and principles were evolved which had the force of actual statutes. The crew of a vessel were hung for the murder of their captain whose body could not be found. They pro-

tested their innocence to the last. Later the supposed victim came back, alive and well. A woman and her two sons were hanged for the murder of a farmer on the confession of one of the sons who claimed that the body had been secreted. The day after the hanging, the farmer arrived home. From these and similar cases arose the rule in regard to the *corpus delicti*, which obtains today, that either the death or the wrongful act must be proved by direct evidence. No man can be convicted on circumstantial evidence as to both.

Chief Justice Fortescue, when traveling the western circuit in England, in the seventeenth century, saw a woman condemned and burned for the murder of her husband. At the next assizes he heard a servant confess the murder. The judge's horror-stricken comment became part of the common law from that day. "One would much rather that twenty guilty persons should escape the punishment of death," he wrote, "than that one innocent person should be executed."

Since the accused could not testify himself at all nor his witnesses be sworn, the judges put the burden on the prosecution of proving entirely every detail of its case, unhelped by presumption or probability. This, they reasoned, was the least they could do for men who were not allowed to defend themselves. Out of this practice grew the presumption of the innocence of a person accused of a crime. This presumption is not based on any logic and has been adopted arbitrarily. Human experience shows that usually things asserted are so. The percentage of falsehood is inconsiderable. All human society is built on belief. The mere fact that a charge has been made against a man would naturally put the burden on him to disprove it. Yet in all English-speaking countries, an accused is presumed to be innocent. This presumption attaches from the beginning and follows him through each stage of the proceedings. He may be found guilty by a committing magistrate and a grand jury, yet he comes to trial a presumably innocent man. He may be convicted by a judge and jury, yet his case must be argued in one, two, and sometimes three courts of appeal as if he were innocent in spite of the fact that at least twenty-seven men have found him to be guilty. This is not so on the continent of Europe. There a man accused of a crime must overcome the presumption which naturally attaches to the accusation. He would not be accused if he were not guilty is the natural reasoning. Today, in addition to this presumption of innocence which is protection enough, we are still conducting our

criminal courts under out-worn technicalities which were devised to save innocent men but which now are used only to shield guilty ones and which have been abolished in England, the country where they originated, for over thirty years. A few instances taken at random from the digests will illustrate the truth of this assertion.

In Texas not long ago, a man was tried and convicted of robbery. There was no question either as to his guilt or as to the fairness of his trial. On appeal it appeared that the indictment specified the crime as having been committed in the town of Groveton, Texas, omitting the name of the county. In spite of the fact that there was only one Groveton in the state of Texas and that no question in regard to the indictment was raised at the time of the trial, the case was reversed. The same thing happened in Massachusetts. A man was convicted of burglary in Westminster, Worcester County, Massachusetts. The name of the county appeared at the head of the indictment, but later on was omitted, being simply referred to as "said county." On appeal the judgment of conviction was reversed.

In many states the letter of the law has been invoked to save convicted criminals, said letter being one that was omitted from the indictment. In Alabama a murderer gained a new trial because a copying clerk left out the letter "l" in the word "malice." In North Carolina another murderer was saved because the letter "a" was left out of the word "breast." In West Virginia a horse-thief was released because the indictment ended in the words "against the peace and dignity of the state of *W.* Virginia," instead of "against the peace and dignity of the state of *West* Virginia."

In Missouri a criminal convicted of a revolting crime against an orphan child was released by the supreme court because the word "the" was omitted by a copying clerk in copying the words "against the peace and dignity of the state."

In Missouri, Leo Judd was sentenced to imprisonment for two years for illegal registration under the name of Charles Cohn. On appeal the case was reversed because the name "Cohn" was in the last part of the indictment spelled "Cohen." In Delaware a man was arrested for stealing a pair of shoes. During the trial, it appeared that both shoes were for the same foot. The case was dismissed because the stolen shoes did not constitute a "pair."

In another state a criminal was convicted of the larceny of a

certain number of eggs. On appeal the judgment was reversed because, said the learned judge, "there is nothing in the indictment to show what kind of eggs these were." "They might," went on the imaginative judge, "have been adders' eggs in which case there could be no property rights in them and the defendant could not have been guilty of larceny."

The supreme court of California held that the indictment which set forth an assault by means of a heavy stick was fatally defective because the means of injury were not described with sufficient precision. The masterly reasoning of the supreme court of California is worth quoting:

> Describing a stick as heavy imparts no certain information. The term is relative. A stick which in the hands of a boy or feeble person would be considered heavy, in the hands of a robust person would be deemed light. Aside from the use of the term "heavy," there is no description in the information as to the definite weight, strength or size of the stick, or other characteristics showing that it was a means likely to produce great bodily injury.

All of the above cases are instances where technicalities which were formerly needed as helps against overwhelming odds, have been retained although now the odds are all against the prosecution. The wonder now is not that so many guilty men escape, but that under our present system any guilty men are ever convicted. Where they have money enough to employ the most able counsel and to take advantage of every delay and technicality available, they practically never are convicted, as in the Thaw case. There a man was guilty of a cowardly and deliberate murder of a prominent citizen under circumstances which brought the attention of the world to the occurrence. In spite of his crime, he escaped safe and unsound into an asylum. As this article is being written, he is now on the point of obtaining his liberty even from that nominal restraint. To quote from the argument of Mr. Jerome, the district attorney who tried his case: "This trial has left a trail of ignominy, disgrace, filth and scandal behind it that has been absolutely appalling." Such a record would not have been possible in England with its common-sense procedure.

In Atlanta, Eugene H. Grace has just died from a gunshot wound which he claimed was received from his wife who, according to his story, shot him while he was asleep to recover his insurance and who refused to send for a doctor when he awoke in agony with

a bullet wound near his spine. On the trial, he was not permitted to testify against her, since, under the laws of Georgia, a man cannot testify against his wife even if she has attempted to murder him.

As a reaction against the lack of the right of appeal to a prisoner, a convicted criminal now has practically an unlimited right of appeal. This involves interminable delays. On March 24, 1910, Albert Wolter killed Ruth Wheeler, a fifteen-year-old child, in New York. He was convicted of murder in the first degree. On April 22, 1910, an appeal was taken and execution delayed thereby until January 29, 1912. In the same state, the Patrick case took two years and three months, the Smith murder case, a month less than four years, and the Sexton homicide trial two months less than three years. By-products of this failure of our criminal procedure have been the murder of 131,940 people in twenty years and the conviction of 1.3 per cent of the murderers, 3413 lynchings in about the last quarter century and the institution of "third degree" methods with prisoners in most of our large cities.

It may be fairly stated, however, that this nonsense age of criminal procedure is passing. We are now going through a transition period of sentiment. In Pennsylvania, practically no prisoners serve their sentence out. They are always either pardoned or paroled. In fact the Board of Pardons of Pennsylvania frees so many prisoners every year, that it has been suggested that it be renamed "the court of general jail delivery" instead of the court of oyer and terminer which now possesses that title. Its most recent performance was the release of one McMahon who had deliberately shot and killed a man and whose attempt to pose as a hero was ended by a sentence to ten years' imprisonment. He was released after serving two years and five months. In September, 1913, two prisoners named Haight and Jordan were paroled from the Eastern Penitentiary of Pennsylvania. A few weeks later they committed burglary in New Jersey and have since broken jail and escaped.

In South Carolina, Governor Blease, the advocate of lynch law, up to July 10, 1913, had pardoned 721 convicts and just before Thanksgiving freed 100 more.

Governor Patterson of Tennessee pardoned 956 criminals, and 152 of them were murderers. In New York, Haines, who was guilty of a particularly cold-blooded murder has been pardoned, and is now writing reminiscences of his murder for the yellow journals.

Eight years ago in one of our central cities, a man committed murder and was sentenced to be hung. Such a flood of sentimental appeals poured down upon the governor that his sentence was commuted. Six years later he was pardoned. Six months after his pardon, this criminal murdered a man who had befriended him, his friend's wife and three children in order that he might rob his house of $200.

There are indications, however, that the age of common sense in criminal procedure has dawned in this country.

The criminal court of appeals of Oklahoma was asked to set aside an indictment because of the omission of the word "the," and wrote in part as follows:

> We know there are respectable authorities holding to the contrary, but this court will not follow any precedents unless we know and approve the reasons upon which they are based. It matters not how numerous they may have been or how eminent the court by which they are prosecuted. Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice so that the innocent may find it to be a refuge of defense and protection and so that the guilty may be convicted and taught that it is exceedingly serious and dangerous to violate the laws of this state.

Wisconsin has been added to the judicial "white list" by the recent case of Hack *vs.* the State. In that decision the supreme court of Wisconsin over-ruled a number of its former decisions, refused to follow the supreme court of the United States and held that a defendant, by remaining silent, waived his right to arraignment and plea. The court wrote in part as follows:

> Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court will at once give him and then when he has had his trial and the issue has gone against him, should he be heard to say there was an error because he was not given his right? Should he be allowed to play his game with loaded dice?

Again in New York, whose murder trials have been notorious for delay a new light has shone. Anyone who can remember the Molineaux trial, the Fleming trial, the Nan Patterson trial, the Patrick trial, the Barbieri trial and a score of others, will recall that weeks were spent in selecting a jury. In the recent trial of Police

Lieutenant Becker, Recorder Goff took charge of the trial in the same way that an English judge does, and in almost a day brought about a revolutionary reform not only in the selection of a jury within two days, but also by his refusal to permit delays, evasions and petty technicalities.

The supreme court of the United States in the case of James H. Holt, who was sentenced to imprisonment for life for manslaughter, has recently held that no criminal case should be reversed on account of technical errors committed during the trial unless it appears that they affected the merits of the case. This is in line with the statute which the American Bar Association has been trying to have passed as a federal statute for the last six years and which holds as follows:

> No judgment shall be set aside or reversed or a new trial granted by any court of the United States in any case civil or criminal on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has injuriously affected the substantial rights of the parties.

Again and again this measure comes up to Congress with the whole weight of the American bar back of it. Each time that conservative and courteous body grants elaborate hearings, treats the committee of the American Bar Association having the matter in charge with the utmost courtesy (the writer speaks with knowledge as a member of one of them) and—smothers the measure in committee or side-tracks it. When that measure is finally passed, common sense will be statutory.

Another indication of better times is the organization of municipal courts. In Chicago, Buffalo, Washington, and finally Philadelphia these courts have been established on common-sense principles and with common-sense ideals. As to what they mean to a community in their criminal jurisdiction can best appear by a quotation from a letter from Judge Harry Olson, the chief justice of the municipal court of Chicago to this writer in regard to the work of the Chicago municipal court:

> During the past three years our court has entered final judgments in 197,324 criminal and quasi-criminal cases. Eighty per cent of them were disposed of within twenty-four hours of the arrest. There were sixty-eight

appeals and writs of error and only 44 per cent of them were reversed. Here is a striking illustration of speed and finality in the administration of criminal justice in a great city.

In the last analysis, the matter of common sense in our procedure and the reform of existing abuses is a matter of the personal equation. We do not need new laws nearly so much as we need new men who here and there have the courage of their convictions and who are brave enough and wise enough to break away from out-worn precedents and to establish new ones.

REFORM IN CRIMINAL PROCEDURE

By William E. Mikell,
Professor of Law, University of Pennsylvania.

Criminal procedure is the method fixed by law for the apprehension and prosecution of a person who is supposed to have committed a crime, and for his punishment if convicted.

The perfect code of criminal procedure would be one so framed that under it all guilty persons would inevitably be convicted, and all innocent persons accused of crime would be acquitted.

But since a perfect code is impossible, the best that can be done is to make a code that will serve to convict the maximum number of guilty persons and at the same time allow the minimum number of convictions of persons who are innocent.

It would not be difficult to frame a code that would convict every person guilty of an offense, the changing of a single presumption—that everyone is presumed to be innocent until his guilt is proved beyond a reasonable doubt—would serve to increase immensely the number of persons who would be convicted. Such a code, however, would result also in the conviction of many innocent persons. A code that would bring about this result would be intolerable. It has often been said that "it is better that ten guilty persons should escape than that one innocent person should be convicted." Perhaps the proportion might even be increased with truth. It may be doubted if any code would be tolerated under which it would be possible that for every ten guilty persons who escaped punishment one innocent person would be convicted.

It is commonly believed that criminal procedure is static, and that we are today practicing under the rules formulated several hundred years ago. Nothing could be further from the truth. It is a far cry to the time when a prisoner was not allowed counsel; when he was not allowed a copy of the indictment; when his witnesses were not allowed to be sworn; when he and his witnesses might be brow-beaten by the judge with impunity; when he had no right of appeal from an unjust conviction; when the jury were coerced into a conviction by amercement. Indeed a study of our jurisprudence

will show that the changes that have taken place in criminal procedure are greater in number and more far reaching in importance than in civil procedure. Nor is it true, as is sometimes asserted, that the changes that have taken place have all been in favor of the prisoner. Many of the rules that one hundred years ago shielded the person accused—rules that were themselves the outgrowth of the harshness of earlier rules—are today obsolete as a result either of statute law or of judicial decision. It is a rare thing now to find an indictment quashed because of the misspelling of a word, or the use of an abbreviation; acquittals because of slight variance between the indictment and the proof are much less frequent now than formerly; indictments at least for some crimes, are much less cumbersome, than was required fifty years ago. The doctrine of the waiver of rights formerly regarded as inalienable, has been much and beneficially extended; the plea of former jeopardy has suffered a wise curtailment, and many other changes adverse to the accused have been and continue to be made. Nevertheless much remains to be done in the United States in the way of reform. There can be no doubt that there is a widespread popular belief that the courts are not as effective as they might be in the administration of the criminal law and that the public suffers therefrom. This being so it is not surprising that popular writers and speakers should seek to fasten the liability therefor, nor perhaps that they should fasten it on the judges, who render the decisions complained of. There is a plentiful lack of knowledge in the country as to the function and powers of the judicial office. It is true that some of the decisions which are held up to the ridicule of the public could have been avoided, and a different decision justified under existing law, but a decision criticised can rarely be shown not to have been justified under existing law. Moreover there can be no doubt that the judges have much oftener stretched existing law to the verge of breaking their oath to punish criminals, than to protect them. What is really needed for the proper administration of criminal law is not reform of the judges, but reform of the law they are sworn to administer.

With forty-nine jurisdictions, including the federal government, each with its own code of criminal procedure we find, as might be expected, much lack of uniformity, with corresponding degrees of efficiency in the administration of the criminal law in the different states. No state, however, has, as yet, undertaken to draft a com-

plete code of criminal procedure. The so-called codes of procedure that have been enacted cover only a small part of the whole field, so that the judges are driven, in deciding most of the questions that arise, back to the precedents of the common law with all its technicalities born of a time when the judges, averse to inflicting the harsh punishments the law annexed to crimes, were inventing technicalities as a means of softening the rigors of the criminal code. Not only have our legislators not enacted complete codes, but such parts of codes as they have given us are in most cases unscientifically drawn. Most of our codes are mere patchwork consisting of sections enacted from time to time to meet some particular conspicuous failure of justice, such sections not infrequently having no reference to and often conflicting with other portions of the same code. What is needed is a scientifically drawn code covering the whole field of criminal procedure, *i.e.*, criminal pleading and practice, and procedure proper. Such a code should begin with the arrest of the suspected person and cover every step in the subsequent procedure necessary for his prosecution to the final determination of the cause. A much less comprehensive work than this, however, would purge our criminal jurisprudence of most of the grave micarriages of justice that are now justly charged against it. The decisions that of recent years have been the most fruitful of criticism are due to the rules of law governing the indictment. The indictment might be called the palladium of liberty of the criminal. It is certainly the fetich of criminal procedure. If the existing rules of law governing indictments could be recast much would be gained for the cause of justice.

Much ridicule is directed, and with justice, to the senseless verbosity of the indictment, the useless repetitions of words and phrases, the circumlocutions, and technicalities inherited from an age when these things were accounted for righteousness. Undoubtedly much would be gained from a mere cutting away of these excrescences, for the very multiplication of words held necessary to the validity of an indictment adds to the chances of mistakes and omissions which will render the indictment invalid. But more than this is needed even in relation to the law governing the indictment. An indictment is a written accusation of crime made by a grand jury. In theory it is supposed to be prepared by laymen, since lawyers are not summoned as jurymen, and yet no layman that ever lived, and few lawyers not specially trained, could frame an indictment for the majority

of crimes that are tried in our courts every day; and the law reports are full of decisions overthrowing indictments prepared by legal experts, because some of the legal jargon that a technical age required is omitted, or badly stated, or because in the attempt to incorporate all that is necessary, too much has been written in. The courts have said than an indictment to be valid must (1) charge an offense, (2) must state the circumstances in such a manner as (a) to apprise the accused of the cause and nature of the accusation against him, (b) to enable the accused to prepare his defense, and (c) to enable the accused to plead the indictment in bar of a second accusation for the same offense. This seems a reasonable requirement until we discover that to charge an offense does not mean charge it in ordinary language so that the accused may know exactly of what crime he is accused, but in the technical sense; setting out all the so-called "elements of the crime."

An indictment may perfectly apprise the accused of the offense for which he is to be tried, and yet be held invalid because some technical word is omitted which is said to be necessary to describe an "essential element" of the offense. Thus no matter how clearly an indictment apprised the accused that he is to be put on trial for murder, arson, robbery, rape, and a score of other crimes, if the act charged is not stated to have been done "feloniously" no conviction can be had. The word "murdered" is necessary in an indictment for murder, "took" in an indictment for larceny, and "burned" in an indictment for arson, no matter how clearly the words used show what offense the accused is indicted for. And not only must the correct technical word be used but it must be used strictly grammatically. Thus where a man was indicted for that he "did knowingly sell a certain piece of diseased meat" and was convicted, the Massachusetts court reversed the conviction on the ground that the crime was selling diseased meat, knowing that it was diseased; that knowledge that the meat was diseased was an essential element of the offense and must be alleged, and that the allegation of knowledge in this indictment applied to the sale—"he knowingly sold"—not to the fact that the meat was diseased. In a recent case in Mississippi an indictment for burglary charged that the accused "the storehouse of one X then and there unlawfully and feloniously break and enter." After a trial and conviction the supreme court reversed the conviction because the word "did" was omitted before the word

"unlawfully." Under the same rule an indictment charging a man with adultery or fornication must specifically allege that the woman mentioned was not the wife of the accused; if it does not it is void even though her name clearly shows that she is not his wife. Thus in a Massachusetts case, an indictment charged that Peter Moore did commit the crime of adultery with one Mary Stuart—she the said Mary Stuart then and there being a married woman, and having a husband alive. After conviction the judgment was reversed. The court said, "We suppose it pretty clear to common apprehension, what the grand jury meant by this averment, but the difficulty is that the precision and certainty required in criminal pleading for the security of the accused will not admit any thing to be taken by intendment. An averment that one had committed the crime of adultery, without alleging how and in what manner would be clearly insufficient. The purpose of an indictment is to allege and set forth those facts which constitute that crime; and, for that purpose it must appear that the woman, with whom the illicit connection is alleged to have taken place, was not the wife of the accused." Therefore, though the name of the woman was stated to be Mary Stuart and that of the accused to be Peter Moore, it was held that no crime was charged because Peter Moore and Mary Stuart might conceivably have been husband and wife, and the grand jury may have indicted a man for adultery with his own wife.

Another rule applicable to indictments that causes unnecessary trouble is the fault in pleading known as repugnancy. This fault consists in alleging two repugnant allegations in the indictment and is fatal. An illustration of this occurs in a recent case in Texas. In this case the indictment was for larceny. All the elements of the offense were charged correctly except that it was alleged that the accused took "twenty ten-dollar bank bills, each of the value of twenty dollars." It was entirely immaterial to the constitution of the crime whether the bank bills were ten-dollar bills or twenty-dollar bills, but the allegations being repugnant the court felt obliged to reverse the conviction.

A rule of pleading known as "duplicity" is another fruitful cause of miscarriage of justice in that it requires judges to hold indictments invalid where this fault occurs. In a recent case in Nebraska one was indicted that he did "unlawfully, sell, give away *and* vend spirituous liquors." It was a crime either to sell, or give away

such liquors, and the accused was duly convicted. The supreme court, however, reversed the conviction—properly under the existing rules of law—on the ground that the indictment containing as it did only one "count", charged two offenses, and was therefore uncertain. On the same principle in a recent case in England an indictment was quashed which charged a person with driving a motor "at a rate of speed *or* in a manner dangerous to the public."

The rules of criminal procedure that bring about the unfortunate results such as those above mentioned as well as numerous others that limitations of space make it impossible to treat of, were framed at a time when other existing rules placed the accused at such a disadvantage that they were necessary for the protection of innocent persons unjustly accused, and thus they kept the balance even. They have remained in force though the necessity for them no longer exists, and persons admittedly guilty escape through their operation. They could be abrogated by statute without sacrificing the amount of protection that a wise code should afford to the innocent person unjustly accused of crime.

What legislation there is, and it is not negligible in the United States, is all in the direction of reform. But no state has progressed as far in this direction as Canada and New Zealand. The codes of these countries offer a useful object lesson to us. The American Institute of Criminal Law and Criminology is doing valuable work in an effort for reform; and the legislative research fund is preparing a code of criminal procedure which it will offer for adoption by any state that desires to recast its code.

STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE

By Edwin M. Borchard,

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We hear occasionally of cases in which a person proves his complete innocence of a crime for which he had previously been convicted and imprisoned. These accidents in the administration of the criminal law happen either through an unfortunate concurrence of circumstances, or from perjured testimony, or are cases of mistaken identity, the conviction having been obtained usually on circumstantial evidence.

A few recent cases will serve as illustrations. A person named Toth was convicted of murder in Pennsylvania and sentenced to life imprisonment, in spite of his continued protestations of innocence. After having served twenty years of his sentence his innocence was established beyond a doubt. He was released from prison a physical wreck. The law could only give him his liberty; the legislature declined to grant him compensation for the wrong the state had committed, and finally Andrew Carnegie saved him from starvation by paying him a small monthly pension. The famous Beck case in England arose through mistaken identity in conjunction with negligence on the part of the English police and the English courts. Beck served seven years on a serious charge and was then released only because the real offender fell into the hands of the police and the mistake of identity was established. There are numerous cases of this kind. Judge Sello of Germany in a book recently published collects a great number of them from various countries of the world.

The matter with which we are now concerned is to ascertain whether the state, by simply opening the jail door, has completely fulfilled its obligation toward these unfortunate victims of the errors of justice. Let us see what the state has done in these cases. It has taken the man from his daily occupation by mistake, either because circumstances appeared against him, or because he looked like the real criminal, or from some other mistaken reason. The state must of course prosecute those who are suspected of crime; but when the facts subsequently show that it has convicted and imprisoned an

innocent man, does not the state owe that man compensation for the special sacrifice he has been compelled to make in the interest of the community?

Our law begins with the assumption that the state can do no wrong and it is therefore apt to be indifferent when by its own wrong it has injured an individual citizen. With the progress of time, however, the state has come to compensate for many of its wrongs, and the federal government and practically all the states now freely subject themselves to suit at the hands of injured individuals. It was for this purpose that the federal court of claims was established. Again, the state freely admits that, for certain interferences with private rights for the public interest, compensation to the private individual must be made. Thus when his private property is taken for a public use, such as a public building or a road, compensation is made. This is a fundamental idea in our constitutional law and has existed for centuries. Yet when the liberty of an individual is taken for the public use—and the preservation of the public peace through the administration of the criminal law is a public purpose at least equally as vital to social welfare as the erection of public buildings—the right to compensation is apparently overlooked. Why? Dean Wigmore in an editorial on this subject has said:

> Because we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which *per se* admits that our justice may err. But let us be realists. Let us confess that of course it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. This measure must appeal to all our instincts of manhood as the only honorable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable.

Let us briefly state the two main theories which underlie such compensation. The first is the theory of eminent domain which we have just mentioned, that is, that the owner of private property which is taken for public use shall be duly compensated. In this case private liberty, a right at least equally as sacred as that of property, is taken for the public use. And here we may note a fallacy in a contention which has been advanced against this analogy. This contention is that when property is taken the community is enriched and on a well-known legal principle, the doctrine of unjust enrichment, the state must pay; whereas when liberty is taken the state is not

enriched. The fallacy consists in this fact—that the compensation paid does not represent the benefit secured by the state, but the loss inflicted on the individual. The analogy to eminent domain is therefore apparent.

The other theory is the same as that which supports workmen's compensation, which has now received legislative expression in practically every progressive state and is gaining ground constantly. The principle is this—that in the operation of any great undertaking, such as the management of a large industry or the administration of the criminal law, there are bound to be a number of accidents. In other words, among the thousands that are annually convicted some will be wrongfully convicted through mistake. We have recognized, in certain spheres of activity, that it is unfair to the individuals injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members. Where the common interest is joined for a common end—maintaining the public peace by the prosecution of crime—each individual member being subject to the same danger (erroneous conviction), the loss when it occurs should be borne by the community as a whole and not by the injured individual alone.

In moving for this amendment of the criminal law we are guided not solely by our sense of justice, but have, as models, the legislation of practically every country in western Europe. Germany, France, Austria, Portugal, Denmark, Norway, Sweden and Switzerland now have elaborate statutes governing this subject and will in all probability soon be joined by Italy and Holland.[1] Ever since the French Revolution, reformers and criminalists have sought to bring about this amendment of the criminal law, and from 1886 on they have seen their efforts crowned with success in one country after another. Why should we in the United States lag behind any longer? The justice underlying the compensation is apparent. In overcoming practical objections, to which we shall now address ourselves, we again have before us the examples furnished by the countries of Europe.

We must distinguish two classes of injustice of the character under discussion. The first is the detention of an erroneously accused innocent person extending up to his acquittal. An injustice has here been

[1] See Senate Document 974, 62d Cong., 3d sess., "State Indemnity for Errors of Criminal Justice" by Edwin M. Borchard, with an editorial preface by John H. Wigmore. Washington, Government Printing Office, 1912, 33 p.

done undoubtedly, in that the accused has been unjustly detained and put to the trouble and expense of defense against a criminal prosecution. Massachusetts, by an act of June 22, 1911 (ch. 577), authorizes compensation for lost income to acquitted or discharged persons confined in excess of six months while awaiting trial.

Yet the case of unjust detention pending trial is left aside for the present, in order that we may deal with the much more flagrant injustice of a conviction of an innocent person followed by sentence and imprisonment. Where the facts show that the conviction has resulted through no demerit of his own, certainly the state owes the victim compensation for the grievous wrong that he has been compelled to suffer. Most of the European countries provide for indemnification in both cases, that is, detention pending trial which results in acquittal, and the still harsher case of unjust conviction and imprisonment. We propose to deal now with the practical features of compensation in the case of erroneous conviction.

A right to relief of this kind might be abused if it were not strictly limited. We propose therefore so to limit the right to compensation that its benefits could be obtained only in cases of the grossest injustice and most deserving relief. Here again we may learn much from European laws.

It is clear that we can not compensate every acquitted person. In fact under our lax administration of the criminal law and the possibility of technicalities producing injustice, we know that many morally guilty persons are legally acquitted.

We would first, therefore, compel the unjustly convicted person claiming the right to relief to prove that he was innocent of the crime with which he was charged and not guilty of any other offense against the law. And here, he must satisfactorily show one of two things: that the crime, if committed, was not committed by the accused, or that the crime was not committed at all. This at once eliminates from consideration a vast class of possible claimants.

In the second place, the loss indemnified shall be confined to the pecuniary injury, that is, loss of income, costs for defense and for securing his ultimate acquittal or pardon, and similar losses. It is true that the pecuniary injury is in these cases the smallest element of loss; the damage to reputation and the mental suffering are by far the greater injuries. To compensate this moral injury, however, might entail severe burdens on the state treasury and open the way

to speculative claims. For this reason it might be better to exclude from all possibility of claim the moral injury suffered. In any event, we would limit the amount of the relief to $5,000, as the highest sum recoverable.

Again, certain other limitations must be provided for, either specifically, or by being taken into account by the court awarding the compensation. For example, the accused must not by censurable conduct of his own have caused his arrest, prosecution or conviction; thus, the concealment of evidence, the making of a false confession or any similar reprehensible act should operate as a bar to the claim. This follows the well-known maxims that a claimant must come into court with clean hands, and that no one shall profit by his own wrong. As the award of an indemnity is to be discretionary, the court should take into consideration all the circumstances of the case which may defeat or in any other way affect the right to and the amount of the relief.

Finally, the action must be brought within a brief period of his release from imprisonment; six months would be a reasonable time to allow.

There may be some difficulty in the matter of procedure, although this can easily be adjusted. We consider the court of claims, or similar state court having jurisdiction of claims against the state, as the forum appropriate for this relief, more so than the trial, appellate, or second trial court, even though these courts could perhaps better judge of the intrinsic merits and circumstances of the case. Moreover, an executive pardon is often based on evidence which has never been submitted to a court. We advocate jurisdiction being given to a court of claims in order to maintain the traditions of American judicial procedure. If the jury or trial court were given the right to pronounce on the propriety of an award in a case of acquittal (as is the case in some of the European countries), it would bring into our law a new kind of acquittal in which the jury or judge could acquit with degrees of approval or sympathy, a procedure which might give rise to odious distinctions. While it would be desirable to have the benefit of the special knowledge of the case secured by the trial court or by the jury, it is better to forego this advantage for the sake of conformity with legal custom and to leave the establishment of the damage to a court having jurisdiction of other claims against the state.

It may be argued as an objection to such a measure that the case is of rare occurrence. The very fact, however, that there will be few demands on the state treasury should overcome any hesitation there may be to enact appropriate legislation. The mere rarity of the case is no reason for a failure to acknowledge the principle and to remedy the evil. It makes the individual hardship when it does occur seem all the more distressing. Dean Wigmore has explained our previous indifference to the grievous injustice thus inflicted on innocent individuals as follows:

> It is nobody's interest, apparently, to move for such a law. You and I have never suffered in that way; no large business is threatened; no class of persons feel a loss in their pockets; and so nobody exerts himself. Only the casual victims feel the wrong and to expect them to unite in a demand for legislation is absurd.

We have undertaken to draw a bill to regulate this question so far as it applies to convictions of innocent persons in the federal courts. The bill has been introduced in both houses of Congress; it is now before the judiciary committees, and it is hoped will become a law. The bill is here given in full:

A BILL

To grant relief to persons erroneously convicted in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, having been convicted of any crime or offense against the United States, shall hereafter, on appeal from the judgment of conviction or on the retrial or rehearing of his case, be found to have been innocent of the crime with which he was charged and not guilty of any other offense against the United States, or who, after inquiry by the executive, has received a pardon on the ground of innocence, may, under the conditions hereinafter mentioned, apply by petition for indemnification for the pecuniary injury he has sustained through his erroneous conviction and imprisonment.

Sec. 2. That the claimant may, within six months after he has been finally acquitted or pardoned on the ground of innocence, petition the court of claims for the relief granted in this act.

Sec. 3. That the court is hereby authorized to make all needful rules and regulations, consistent with the law, for executing the provisions hereof.

Sec. 4. That the claimant shall have the burden of proving his innocence, in that he must show that the act with which he was charged was not committed at all or, if committed, was not committed by the accused.

Sec. 5. That the claimant must show that he has not, by his acts or fail-

ure to act, either intentionally or by wilful misconduct or negligence, contributed to bring about his arrest and conviction.

Sec. 6. That the court of claims shall examine the validity and amount of all claims included within the description of this act; they shall receive all suitable testimony on oath or affirmation and all other proper evidence; and they shall report all such conclusions of fact and law as in their judgment may affect the right to relief.

Sec. 7. That upon proof satisfactory to the court of claims that the claimant is unable to advance the costs of court and of process, the cost of obtaining and printing the record of the original proceedings and of securing the attendance of such witnesses as the chief justice or the presiding judge of the court of claims shall certify to be necessary, and the service of all notices required by this act, shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a duly authenticated order, certified by the clerk of the court of claims and signed by the chief justice or, in his absence, by the presiding judge of said court.

Sec. 8. That the court shall cause notice of all petitions presented under this act to be served on the attorney-general of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this act, and to be heard by the court. He shall resist all claims presented under this act by all proper legal defenses.

Sec. 9. That the court of claims in granting or refusing the relief demanded shall take into consideration all the circumstances of the case which may defeat or in any other way affect the right to and the amount of the relief herein provided for, but in no case shall the relief granted exceed five thousand dollars.

Sec. 10. That in all cases of final judgments by the court of claims the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a copy of said judgment, certified by the clerk of the court of claims, and signed by the chief justice or, in his absence, by the presiding judge of said court.

Since the enactment of this legislation was first proposed in this country, in January, 1913, two states of the Union, Wisconsin (Laws of 1913, ch. 189) and California (Laws of 1913, ch. 165), have enacted statutes on the lines of the above bill. The public press has given it more general support than is usually accorded to new proposals for specific improvements in the law. In these times, when social justice is the watchword of legislative reform, it is not an unreasonable expectation that statutes, carrying into effect this desirable reform, will soon be enacted by our federal and state governments, for which Wisconsin and California may be regarded as worthy examples.

CHICAGO COURT OF DOMESTIC RELATIONS

By William N. Gemmill,

Judge of the Municipal Court of Chicago; President of the Illinois Branch of the American Institute of Criminal Law and Criminology.

This unique court was organized in April, 1911, by a resolution adopted by the judges of the municipal court. Under an act of the legislature creating this court, the judges were given the power to establish branch courts, and to prescribe the procedure for them. All cases involving wife and child desertion, contributing to the dependency or delinquency of children by parents and others, violations of the child labor law, and the law forbidding women to work more than ten hours during any one day, actions for selling liquor and cigarettes to minors, violations of the truancy laws, and actions in bastardy and against abortion are now all brought together in one centralized court and tried by one judge sitting continuously in that court. This court is called the court of domestic relations.

For the first year of the court, Chief Justice Harry Olson assigned Associate Judge Charles N. Goodnow to preside, and the writer was assigned in the same manner, for the second year, ending April 30, 1913.

While presiding over this court during the last year, the writer tried 3,699 cases, in 2,024 of which either the wife alone or the wife and children were deserted by the husband and father. To one who has listened through the whole year to the harrowing stories of abuse, privation, amounting often to starvation, as told by these deserted women and children, it becomes very apparent that women not only have a greater capacity than men for undergoing suffering and enduring hardship, but that they exhibit a greater loyalty towards their children and their dependent blood relations. Notwithstanding the fact that hundreds of these deserted women are often left, sometimes in the midst of severe winter, with several children dependent upon them, they always keep up the struggle, often by taking in washing, doing scrubbing, or other similar work, and at a great personal sacrifice, to keep the family together, and save them from starvation.

The court of domestic relations, so far as I know, is the only one ever created whose primary function is to keep the family together. Our divorce courts were organized to separate families. Seldom is an effort made in them to reunite those who, for some reason, have found their married relations uncongenial. But during the last year more than 50 per cent of the divided families brought into the court of domestic relations were induced, through the intercessions of the court, to reunite and forget the mistakes of the past, so far as possible, in the interest of the larger purpose of keeping the families together, by making the home a fit place for the growth of children. It is, however, not always desirable that separated families should be reunited. It often happens that the cause for the separation is one of a nature which makes it imperative that the husband and wife should not again live together. Our education has led to the view that marriage is always to be encouraged and divorce discouraged. If, however, our race is to be more virile than it is today, we must change this view. No day passes in the court of domestic relations but that the judge is called upon to listen to some terrible life tragedy. A young girl full of hope, ambitious, with high ideals, met and married a man whom she had every reason to believe was pure, and possessed of ideals as lofty as her own. Scarcely, however, had the marriage taken place, when she discovered that instead of to a man, she had bound herself for life to a monster, and life offered nothing to her, and the children that might be born to her, but unspeakable torment. For such as these, marriage is a curse, and divorce a great blessing. We hear it said that divorce destroys the sanctity of the home. Few people, however, imagine how many homes there are where the only thing left for divorce to destroy is inhuman and unspeakable cruelty, and the possibility of multiplying the increasing army of defectives and criminals. We have many moral reformers who say that a young woman having once made the fatal mistake of being led to the altar by a man of this sort, should be compelled to continue her life with him, although by so doing she will never know a single hour not filled with unutterable sorrow and bitterest disappointment. In this day of progress we are becoming more humane. There is not a criminal, no matter how grave his offense, but may hope for pardon and parole, and thus another opportunity to begin life anew. Why should we shut the doors of hope to the thousands of women whose only offense was to love madly, but not wisely?

During the last year I tried, by means of a card index, to arrive at some of the causes which separate families. Whenever an applicant came into court he or she was first met by a young lady, assistant to the judge, who made careful inquiry into the family history of the applicant. All such data were recorded upon a large card kept for that purpose. If the case was an ordinary one involving wife abandonment, or some other well-known offense, coming within the jurisdiction of this court, this assistant prepared the formal complaint and warrant for the arrest of the delinquent party, all of which she thereafter presented to the judge, either in chambers or upon the bench. If the case was an unusual one the applicant was brought directly before the judge before any further steps were taken. Upon the same card, blank spaces were left for the judge to record his conclusions, after hearing the case upon the trial. If a woman was deserted upon one day it often followed that she would apply to the court on the same day, and a warrant was issued for her recreant husband. It frequently occurred that before the husband had been able to board a train with his paramour upon the day of his desertion, he was seized and brought before the court.

Of the 3,699 cases tried during the year, over 2,000 of them were heard within one week after the complaint was made to the court, and in the 2,024 cases in which husbands were charged with deserting their wives and children, the husbands were arrested and brought before the court, and an order entered for the payment of money, for the support of their dependent families, in more than three-fourths of the cases, within two days after the first complaint was made to the court. The following is a summary of my conclusions as registered upon this card, and filed for record in the case. In each instance the data were registered either during the hearing of the cause or immediately afterwards. This table has to do altogether with cases of wife and child abandonment. Like tables were kept in all other classes of cases. The causes for such abandonment were as follows:

	Per cent
Excessive use of intoxicating liquors	46
Immorality of husband	12
Immorality of wife	2
Ill-temper and abuse by husband	8
Ill-temper and abuse by wife	3
Venereal disease of husband	12

	Per cent
Interference of mothers-in-law	6
Interference of fathers-in-law	1
Youth of parties	4
Laziness of husband	3
Sickness	1

While our records show that, in a great majority of instances, the greatest blame rests upon the husband and father for breaking up the home, yet in very many instances the women are the greater offenders. Nor is this to be wondered at. In a large city most of the women are confined during the greater part of their lives within the narrow walls of a flat or tenement house. They are often surrounded by warring and disagreeable neighbors who make life a burden to themselves and to all those coming near them. The result is that they become irritable and disagreeable, and their husbands at night become the objects of their stored-up wrath.

By reason of the great power conferred upon this court it is able to compel many drunken, lazy and shiftless men to contribute quite largely to the support of their families. The court has the power to take summary action in all cases involving family support. A deserting husband finds, when he is brought before the court, that he has only one alternative; he must support his family or go to the Bridewell. If he shows an unwillingness to support the family he finds himself upon the way to the Bridewell within an hour after such unwillingness is displayed to the court. The result of this action, in a financial way, during the last year was that $75,562.59 was paid into the court by men of this kind, and by the court paid out, for the support of dependent families. An additional sum of almost an equal amount was likewise paid upon order of the court directly by the men to their families, without passing through the court.

We are, however, greatly handicapped, by reason of the failure of the Illinois statutes to provide that workhouses, wherein prisoners are employed, be required to pay a portion of the earnings of such prisoners to their dependent families. In Illinois nothing is paid by the state or the city to such families, although the heads of the families are required to work constantly during the terms of their imprisonment. This thrusts upon philanthropic organizations and private charities the burden of caring for these families, a burden which is becoming altogether too heavy for them to carry. It is the aim of the court in dealing with cases of wife abandonment to permit the

offending husband to go upon parole, whenever he gives a bond with proper surety conditioned upon the payment of a certain fixed sum for the support of his family. The greatest difficulty arises, however, by reason of the fact that many wife deserters have no financial means, and are unable to secure anyone to execute a bond in their behalf. The court is, therefore, faced in all such cases, with the alternatives of either allowing such persons to sign their own bonds, trusting to their honor to make payments as prescribed in the bond, or of sending them to the Bridewell. In nearly all cases the first alternative is adopted and such persons, unless they are of known bad character, are permitted on parole upon signing their own bonds. It frequently happens, however, that being released they fall into their old habits, and fail to make the payments, as ordered by the court. It often follows that such persons are arrested sometimes three or four different times and brought before the court in an effort, only partly successful, to secure the needed family support. In most of such cases the threat of the workhouse arouses a wholesome fear, that brings to the court many thousands of dollars, for the support of needy families. There are, however, many men who have fallen so low that even the Bridewell has no terrors for them. Indeed, in not a few instances when deserting husbands were told by the court that they must either support their families or go to the Bridewell they gleefully accepted the latter alternative.

Prior to a few months ago the wife abandonment statute of Illinois had been construed by our courts as making wife abandoment a continuing offense. A recent decision of the supreme court of this state declared otherwise, so that under the act as it stands today, a husband once convicted of abandoning his wife can only be held for her support for a period of one year, and unless he rejoins her after that time, he can never again be charged with her abandonment. This unfortunate interpretation of the statute greatly hampers the work of the court and the accomplishment of justice.

During the last year 499 couples were brought before the court in bastardy actions. The writer married 162 of these couples. Judgments aggregating $165,000 were entered in these cases. Under the Illinois statute the defendant when found guilty may be ordered to pay the sum of $550 to the prosecutrix for the support of the child, this to be paid through a period of nine years. Fifty-one per cent of the women involved in these cases were domestics. It has been

said that in many cases of this kind the women were led to their downfall by reason of low wages, etc. A careful analysis, however, of the cases before the court last year does not demonstrate the truthfulness of the assertion.

In 130 cases before the court last year men were charged with contributing to the delinquency of girls. The offense generally consisted in taking girls to hotels or disorderly houses. A few of these men were hardened characters, who cared nothing for the effect their conduct would have upon the lives of such girls, but by far the larger number of men so brought before the court were but boys ranging in age from fifteen to twenty years. Most of these boys had been led to commit their first crime through a chance meeting, upon the street, with one or more of these young girls, most of whom are from fourteen to seventeen years of age. Few people realize how many such girls there are upon the public streets of most any town or city, and fewer people realize the individual power for evil of such girls when they have gotten out from under parental restraint and are permitted unhindered to run upon the public streets at all hours of the night.

During the last year in the court of domestic relations the writer tried 210 persons charged with violating the child labor law and the laws prohibiting the selling of liquor, tobacco and cigarettes to minors, and 98 cases involving the violations of the law forbidding the employment of women for a period of more than ten hours during any one day. The child labor law of Illinois has had a most beneficial effect in taking children out of factories, workshops and department stores, and in limiting the hours of their employment. There is, however, a danger not well understood by the average citizen, growing out of the strict enforcement of this law. In Illinois no child under the age of fourteen years can ever legally be employed at any gainful occupation, and children between the ages of fourteen and sixteen years cannot be employed during the months when school is in session, unless a certificate is obtained from the school authorities, permitting such employment. One of the results of the rather strict enforcement of this law has been to turn hundreds and thousands of bright young boys upon the streets, especially during the summer months when school is not in session. They meet in groups in alleys, play marbles, craps and engage in other games of doubtful character. Here the good boy meets the vicious boy and together they plan some escapade which usually results disastrously to both.

It is altogether right and proper that children under the age of fourteen years should not be employed at certain tasks, such as work in factories, etc., but boys of this age should be permitted to perform certain kinds of light work, especially during the school vacations, and to run errands after school under certain circumstances, and thus cultivate habits of industry, and arouse laudable ambitions.

Many saloon-keepers and dealers in cigarettes and tobacco have been arrested and fined for selling to children. It is my opinion that not enough emphasis is given to the need of a strict enforcement of the law against the sale of liquor and cigarettes to minors. I have tried more than 25,000 criminal and quasi-criminal cases, and while it would be altogether untrue to say that all cigarette users are criminals, yet it is true that almost every criminal, degenerate, defective and delinquent man or woman brought before the court, was a user of cigarettes, and nearly every truant was found to be addicted to the habit. In the vast majority of these cases the most unfailing accompaniments of the degenerate, professional criminal, defective and feeble-minded individual are the yellow-stained fingers, the discolored lips, the dimmed and water-soaked eyes, dullness of hearing, and the absence of almost all moral perception.

The court of domestic relations is now a firmly established institution. Its moral force in the community is most salutary. Thousands of men upon whom the responsibilities of married life rest lightly are kept in a fairly straight and narrow path by a knowledge of the fact that there is an institution well equipped to mete out summary punishment to wife and child deserters. No one unfamiliar with the court can appreciate the range of its activities. Family skeletons are always on parade; usually from twenty to fifty stalk in and out of the court every day; some of them are most hideous; others are mirth-provoking and welcome, for they relieve the tension. But few lawyers appear in the court. In not over one out of five cases does a lawyer appear on either side. Nearly all of the questions are put by the judge and are aimed to reach the heart of the trouble by the most direct route. The one all-embracing question is at once addressed to the deserting husband, who is now thoroughly sobered by his arrest. That question is, "Why did you leave home?" If all the answers to it during one month could be compiled, they would make interesting reading. The volume could be used to point many moral lessons, but it could also be used as a valuable

joke book. Here are a few of the answers: Daley left home, as he said, because his wife refused to wear mourning to her mother-in-law's funeral. When I turned to the wife and asked why she did not wear the accustomed black, she promptly replied: "I am no hypocrite; I was not sorry the old thing died and I was not going to make anybody think I was." Another said he left home because his wife persisted in wearing her kimono to the breakfast table. When I asked her why such conduct, she replied that she was brought up that way and she never would change. Another said he left home because the bill for his mother-in-law's false teeth came with his monthly grocery bill. Another, a pretty young Swedish girl, married to an artist, said she left home because her mother-in-law went everywhere with them on their honeymoon.

In many cases the court was called upon to determine how much a wife, whose husband earns from $15 to $20 per week, should pay for her spring or fall hat. In many other cases the question for the court's solemn adjudication was how many afternoons during a week may a wife go to the movies and properly take care of her home. In others the all-important question was how much the wife should allow her husband during the week for carfare, beer and cigars. I found the usual allowance by a thrifty housewife was 5 cents per day. A frequent complaint by one side or the other was the infrequent intervals between baths, and the court had judicially to determine what was a proper interval.

A day seldom passed in this court when from one to five women were not carried from the room in an unconscious or semi-conscious condition due very often to epilepsy or to some other form of incurable disease.

Last year we established two extra rooms in connection with the court, one where the children might wait with their mothers until the cases in which they were interested were called for hearing. In this large room were kept tables upon which was furnished the latest reading matter, and many rocking chairs and blocks from which the children could erect houses, etc. In the other room several children's cots were placed and no day passed without some unfortunate babes sleeping upon these cots entirely unconscious of the work going on, for their care, in the court outside. It often happens that from five to ten or fifteen babies are brought to the court in a single day. Many of these babies are not over one week old. For

the care of these children and their mothers the court has now employed a nurse, who devotes her whole time to this service. Milk is also supplied for the use of the waiting children.

While the court is doing much in an advisory way in helping to reëstablish broken homes, yet too much emphasis must not be placed upon this kind of work, for the presiding judge is called upon every day to enforce the law with rigor. It is the fear of the penalties which the law prescribes which enables the court to obtain any kind of justice for the injured. Take away from the court of domestic relations this power to punish without ceremony or delay the evil-doer, and the court would lose all its efficiency. No day passes but what it becomes necessary, in order to break down the stubborn will of a wife deserter, that he be sent to the workhouse. Usually within an hour or often within ten minutes from the time he is arraigned in court he finds himself upon the way to the Bridewell. After he has been there a day, possibly two or three days, a great change comes over him and he sends a most urgent appeal to the court to release him on parole. Accompanying such an appeal is a promise henceforth to provide properly for his family. It follows, therefore, that while the court daily sends many wife deserters to prison, it brings back from the prison in the course of a week a number substantially equal to the number sent, and a new opportunity is offered. One such committal is usually sufficient to accomplish the court's purpose. It is sometimes necessary, however, that the same person be committed two, three and four times before his lesson is thoroughly learned.

In advocating law reforms, in order to secure social justice, it is all-important to keep in mind the urgent need of keeping the law strong and virile, and in making the penalties for its violation real and substantial.

THE PRIVILEGE OF THE ACCUSED TO REFUSE TO TESTIFY

By Herbert R. Limburg,
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The extent and character of public criticism of our courts may well be regarded a thermometer registering the degree of success with which our law is administered. The writer proposes to consider at the outset, how the privilege of the accused to refuse to testify affects the administration of the law, and to what extent it may be responsible for criticism of the courts.

The importance of dispensing justice is no greater than the importance of satisfying the community that justice is dispensed. There is no such thing as absolute justice. Our standards are always more or less artificial. They are merely the expression of our ever changing view of public morals and of public and private right. In a sense law is justice, and as we change our law we change our justice; indeed our statutes as well as our judge-made law represent merely the standard of morality adopted for the time being. That is why the public opinion of the administration of the law is so important, and why it may be of interest to analyze briefly some phases of the common criticism of our courts. This may enable us to discern specific weaknesses and the remedy therefor.

The object of every trial, whether civil or criminal, is to ascertain the truth. In the final analysis every case presents a simple question, to which the courts are called upon to give a categorical answer. This question is: Are the facts stated in the "complaint" in a civil case, or in the "indictment" in the criminal case true? That is the sole question that a jury is called upon to answer, and from the answer flow the legal consequences prescribed by our then system of law and morals. Our rules of procedure in themselves amount to nothing more than the method adopted for the sake of convenience and regularity, by which the jury's answer to this question may be secured. If they assist toward a correct ascertainment of the facts, they may generally be regarded as good rules; if they tend toward suppressing the truth or toward rendering a correct determination of

the issue more uncertain, they are inherently unsound. The great cry against the "law's delays" is but one phase of this question. "Justice delayed is justice defeated" is a trite, but in the main truthful statement; not primarily true because delay may inconvenience the individual or the state, nor because delay in itself may frequently occasion hardship, but chiefly because it renders a truthful verdict more uncertain. In fact the most severe criticism to which our courts are ordinarily subjected is that they do not dispense justice, i.e., that our system is not conducive towards reaching a truthful verdict.

In criminal cases the criticism is most frequently made that the guilty escape conviction. The converse—that the innocent are convicted—has doubtless been true in some cases, but these are sporadic and the result in nearly every instance of intense temporary local feeling. However deplorable, these cases are exceptional and cannot be regarded as an indictment of our law or of our system of procedure.

No system has yet been found which will always bring about a correct determination of the facts. The jury system seems to come closer to the ideal than any other, yet it is impossible wholly to remove passion, prejudice or improper considerations from all juries, just as it is impossible to select only perfect judges.

The chief complaint against our system in criminal cases, however, seems to be that there is a large percentage of miscarriages of justice, in cases where the accused is acquitted. Most juries endeavor to reach a conscientious and truthful result. If then, there is any considerable percentage of failures to reach that result, we are confronted with the question whether all of the available evidence has been presented to the jury, and, if not, whether artificial laws or rules of procedure prevent the jury from considering relevant testimony which would assist in reaching a truthful determination of the issues. It is from this point of view that a consideration of our constitutional provision that no man shall be compelled to incriminate himself may well be approached.

The elimination of the accused as a compulsory witness necessarily involves that the prosecution is prevented from presenting evidence which would throw light upon the question at issue. This is so whether the accused be guilty or innocent, for his evidence would tend to show either his innocence or his guilt, and thus assist in its

determination by the jury. In fact the accused is frequently, from the nature of the situation, the one best qualified to give testimony which will determine the truth, yet under our present constitutional provisions he may not be called as a witness. It may even happen —indeed frequently does happen—that the accused is the sole eyewitness of the occurrence, yet the jury are thus deprived of his direct testimony and may be compelled to determine the case wholly upon circumstantial evidence. The proposition that our constitutional prohibition against compelling the accused to testify eliminates relevant testimony does not require further elaboration, for it is practically axiomatic.

Having reached the conclusion that our constitutional rule deprives the jury of relevant testimony, and at times of the best evidence of which a case is capable, and therefore tends to make a correct determination more uncertain, we are next called upon to consider whether there are controlling reasons which should nevertheless induce us to retain the principle of immunity from self-incrimination without change.

And first we may, with propriety, consider whether there is any inherent injustice in compelling the accused to give evidence against himself. This question has been discussed for many years by jurists of distinction. It has been suggested by some that it is inherently unjust to compel the accused to testify against himself, i.e., to furnish evidence upon which his own conviction may be based. Nowhere will be found a more complete refutation of these arguments than in Jeremy Bentham's *Rationale of Judicial Evidence* (1827). Jeremy Bentham labels the two chief arguments of the alleged "injustice" "The old woman's reason" and "The fox-hunter's reason" and expresses himself in part as follows:

> *The old woman's reason.* The essence of this reason is contained in the word "hard:" 'tis hard upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. What is no less hard upon him is that he should be punished; but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself, with this difference, that when he is punished,—punished he is by the very supposition; whereas, when he is thus made to criminate

himself, although punishment may ensue, and probably enough will ensue, yet it may also happen that it does not.

What, then, is the hardship of a man's being thus made to criminate himself? The same as that of his being punished; the same in kind, but inferior in degree; inferior, in as far as in the chance of an evil there is less hardship than in the certainty of it. Suppose, in both cases, conviction to be the result: does it matter to a man, would he give a pin to choose, whether it is out of his own mouth that the evidence is to come, or out of another's?

To this, to which, in compliance with inveterate and vulgar prejudice, I have given the name of the old woman's reason, I might, with much more propriety, give the name of the lawyer's reason. . . . . Nor yet is all this plea of tenderness—this double-distilled and treble-refined sentimentality, anything better than a pretence. From his own mouth you will not receive the evidence of the culprit against him; but in his own hand, or from the mouth of another, you receive it without scruple; so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection—a confirmed and most extensive predilection, for evidence, the badness of which you yourselves proclaim, and ground arguments and exclusions upon in a thousand cases.

The fox-hunter's reason. This consists in introducing upon the carpet of legal procedure the idea of "fairness," in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life; he must have (so close is the analogy) what is called "law"—leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot; it would be as "unfair" as convicting him of burglary on a henroost in five minutes' time, in a court of conscience. In the sporting code, these laws are rational, being obviously conducive to the professed end. Amusement is that end; a certain quantity of delay is essential to it; dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it. . . . . To different persons, both a fox and a criminal have their use; the use of a fox is to be hunted; the use of a criminal is to be tried. . . . .

Confounding interrogation with torture; with the application of physical suffering, till some act is done—in the present instance, till testimony is given to a particular effect required. On this occasion it is necessary to observe, that the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would be, if, instead of being a defendant, he were an extraneous witness. Whatever he chooses to say, he is at full liberty to say; only under this condition, properly but not essentially subjoined, viz. (as in the case of an extraneous witness) that, if anything he says should be mendacious, he is liable to be punished for it, as an extraneous witness would be punished. . . . .

Those who may be interested in pursuing the literature upon this subject further are referred to the *Treatise on Evidence* by Chief

Justice Appleton of Maine (1860), to the fourth volume of Professor Wigmore's monumental *Work on Evidence*, and to ex-President Taft's address to the graduating class of Yale University Law School (1905).

The writer has never been able to discern any inherent injustice in compelling the accused to testify. But the question of justice or injustice does not alone dispose of our problem. The supporters of the doctrine of immunity from self-incrimination also base their arguments upon the abuse which they claim existed before the introduction of this principle, and which they claim now exists in countries outside of the domain of the common law, where the principle of immunity from self-incrimination is unknown.

An extended consideration of these arguments would necessarily involve an examination into the history of the privilege and into the administration of the law on the continent of Europe, which the limits of this article do not permit.

The writer discussed the subject from this standpoint in a paper read last October at the congress of the American Prison Association held at Indianapolis, and in the present article will accordingly limit himself to pointing out what he regards as the salient points and the conclusions to be drawn therefrom.

The introduction in Great Britain in the thirteenth century of the system of compulsory examination of the accused constitutes probably the greatest step in advance that has ever been taken in our judicial history. Up to that time the trial of the accused was by "wager of law" which consisted in the accused pronouncing an oath of innocence in company with oath helpers. Successful pronouncement constituted acquittal, failure meant conviction.

The compulsory examination of the accused substituted for this haphazard system an inquiry into the facts of the case, and the principle that the determination should be based upon the facts.

During the succeeding two centuries this system was administered without substantial complaint. There was indeed a bitter controversy as to the extent of the jurisdiction of the church courts, but there never was any question of the propriety of compulsory examination of the accused, where jurisdiction over the subject matter existed. After this period, however, abuse unquestionably did arise, and indeed remained entirely unchecked until the statute of 1533, which for the first time fixed definite preliminary requisites before the accused could be examined. The rather severe criticism

which eventually brought about the enactment of this statute was not at all leveled against compulsory examination of the accused as such, but against the exercise of the right of examination in the absence of a formal complaint and as to offenses concerning which the accused had not been formally charged.

The system of examining the accused had begun to be misused to harass and examine persons against whom there was no shadow of a complaint, or against whom there existed merely suspicion, in an endeavor to discover some offense or other with which they might be charged. This brought about the realization that the right to compulsory examination had proper limitations, and should be confined to cases in which there was some prima facie evidence of guilt, or at least an accusation by responsible public authorities.

It seems, however, that the discussion as to the necessity for these preliminary conditions was carried on so long and waxed so fierce, that the distinction between the conditions under which the inquisitional oath might lawfully or unlawfully be administered was gradually overlooked, and the matter came to be argued as if the examination of the accused were either wholly lawful or wholly unlawful. Both counsel and courts seem to have lost sight of the distinction which had been enacted into statute after so many years' controversy, viz.: that the compulsory examination of the accused was lawful where there had been the proper preliminary foundation, and unlawful where such foundation was absent—and finally, as the result of a series of judicial decisions, the courts about the year 1700 declared that compulsory self-incrimination in any form or under any circumstances was unlawful.

This was judge-made law pure and simple. It was not, as so many seem to believe, the enactment into statute of a principle of human justice or of human rights, but was nothing more or less than the usurpation of legislative power by the courts. This should not be forgotten, because in the United States the privilege of the accused is declared by express constitutional enactment in every state except New Jersey and Iowa, and in these states it is held to be a part of the fundamental law by implication from other provisions of the constitution.

Only recently the Supreme Court of the United States in an opinion by Mr. Justice Moody (Twining *vs.* United States) asserted that the privilege against self-incrimination "is best defended not as

an unchangeable principle of universal justice, but as a law proved by experience to be expedient." In Great Britain, where, as we have seen, the rule originated as judicial legislation, it is no longer of universal application, but has been much weakened by statutory exceptions. For instance in 1883 a statute was passed which expressly permits compulsory self-incrimination in bankruptcy proceedings. The tendency of our own courts today, as every lawyer knows, is to modify and limit the application of the constitutional provisions.

A critical examination of the history of the privilege against self-incrimination leads to the conclusion that its abuse has depended solely upon the conditions under which the compulsory examination of the accused might be invoked, and that under a system of law which made formal accusation by public authorities based upon sufficient prima facie evidence a condition precedent, no such abuse has existed in the past.

Nor does the experience of these countries which permit such examination of the accused tend to weaken our conclusions. It is undeniable that the exercise of the right of compulsory examination upon the continent of Europe has been singularly effective to ascertain guilt. While upon some—but comparatively rare—occasions the right to examine the accused has been conducted to an oppressive degree, such abuse is rendered possible only by the fact that under the continental system, the examining magistrate acts not only as a judicial officer, but also as prosecutor.

In view of this dual function of the examining magistrate, there is lacking any independent judicial arbiter, whose function it is to control and limit the right of examination by confining it to relevant matters, and to prevent abuse whether arising from undue zeal of prosecuting officers, or otherwise, and it is remarkable, in view of this situation, that the abuse of this system on the continent has been so very rare.

This brings us finally to a consideration of a remedy for present conditions.

Our constitutional rule is undoubtedly detrimental to the interests of justice and unduly hampers the proper administration of the criminal law; yet an unlimited right to examine the accused might lead to grave abuse. In the paper which the writer read last October before the congress of the American Prison Association, he suggested as a possible solution that there be permitted a limited

exercise of the right of compulsory examination, which should be surrounded by the safeguards which experience and history have shown not only to be necessary, but to be entirely adequate. This suggestion is that compulsory examination of the accused should be permitted after indictment, but only at a formal hearing before a magistrate, and with the right to the accused to be represented by counsel and to "cross-examine." The prerequisite of an indictment would compel the public authorities in the first instance to present prima facie evidence of guilt, entirely apart from the proposed examination. The magistrate would secure order, prevent abuse, and would restrict the examination to matters relevant to the indictment. The right of representation by counsel and cross-examination would give the accused immediate opportunity of explaining any evidence apparently indicative of guilt.

Since the publication of this suggestion, the writer has received numerous expressions of approval of such a course from judges, public prosecutors and members of the bar, and he hopes that this suggestion will receive serious consideration and discussion by those having the administration of our criminal law and the improvement of our procedure at heart, and that as a result there will be brought about such statutory and constitutional changes as the situation may call for.

ADULT PROBATION

By Wilfred Bolster,

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The lay mind is so far unfamiliar with the essence of the probation system, and indeed those dealing with the subject at close range often show such a disagreement, if not ignorance, as to its basic principles, that it may be well, in attempting to gain a helpful conception of those principles, to restate a few definitions of probation.

Probation is a judicial system by which an offender against penal law, instead of being punished by a sentence, is given an opportunity to reform himself under supervision and subject to conditions imposed by the court, with the end in view that if he shows evidence of being reformed, no penalty for his offense will be imposed.

Or, probation is the suspension of final judgment in a given case, permitting the offender to have a chance to overcome his weakness or mistake by coöperating with the state through its probation officers. Its method is that of overcoming evil with good.

Or, probation is the conditional forgiveness by society, acting through its judicial officers, of an offender against its penal laws, based upon a reasonable expectation that, if forgiven, he will not again offend; and intended to take effect upon evidence that this expectation has been fulfilled.

The last definition probably is closest to the technical and historical aspects of the system. Legal practice has not yet arrived at the stage of compelling an offender to accept probation. And the almost universal practice at the end of a satisfactory probation period is to dismiss the case, or make a practically equivalent disposition by filing. Neither of these aspects is consistent with a fourth definition sometimes attempted—"a reformatory without walls."

The probation system originated in the practice of the judges of many Massachusetts courts, notably those of the inferior courts in and about Boston, of continuing cases from time to time, after a determination of guilt, and upon satisfactory proof of good behavior

of dismissing the case. Here is the germ of the theory that in certain cases society, by being kind to the defendant, is kind to itself. In a state where a maximum and minimum penalty, itself a rudimentary form of individualized punishment, had become the rule rather than the exception, this judicial practice marked the next step in the evolutionary process. It seems probable that the chief conscious motive was a desire to relax the rigors of the old system of punishment for crime. Reformation, as an end in itself, was in the background. The theory evidently was that society might well forego the entire penalty at times. And apparently society readily adopted the practice, whatever its realization of the theory. In 1878, the mayor of Boston was authorized to appoint a probation officer for Suffolk County, to be under the charge of the chief of police, and whose duty it should be to recommend to the courts of Suffolk County "the placing on probation of such persons as may reasonably be expected to be reformed without punishment." In 1880, this method was made state-wide. In 1891, the law took substantially its present shape, by which probation officers are judicially appointed throughout the state, and become to all intents and purposes agents of the courts. It is significant that all these laws provided only that courts might appoint probation officers, and might place offenders "upon probation." What that term meant in criminal law, what consequences it entailed, were still left for judicial evolution. And such has been the general course of later legislation in other states. In truth, probation is but one aspect of the evolution and growth of the system of individualized punishment.

The history of probation shows that there can be no essential and basic difference between adult and juvenile probation, for probation, in practice, though not legislatively, antedated juvenile courts and juvenile delinquency statutes. The topical division is in some ways unfortunate, as creating the impression of a difference in kind. The difference is only in degrees and methods resulting from the greater plasticity of the material for probation found in juvenile courts, and the more intensive treatment permitted by society because of the greater prospect of ultimate reclamation for society's welfare.

The space limits of this article obviously preclude any detailed description of the practice of probation, but attention cannot be centered too often upon its three cardinal principles, the selection

of only the fit for probation, the choice of properly qualified probation officers, and the need of judicious, unremitting supervision during the term of probation.

Probation is no panacea for crime. It has its definite niche in criminal practice, and any attempts to extend it beyond its proper sphere must result unfavorably. A proper selection of cases for probation should, in the writer's opinion, follow this rule: that the case should, after thorough investigation of the antecedents, environment, temperament and habits of the defendant, disclose a tendency to anti-social ways susceptible of reformation, more reformable outside than inside prison walls, conformably with public opinion, and consistently with public safety. This excludes in most cases the casual offender. A man of previous good conduct, who, under great provocation, assaults another, a woman of previous good repute, who under a sudden temptation, steals in a department store (an offense in which recidivism is exceedingly small), these are not usually cases requiring probationary treatment. What the humiliation of arrest and consequent appearance in court cannot accomplish in such cases, probation is not likely to accomplish. The prompt termination of the case by a moderate penalty or none at all is enough in such cases, because the probability of relapse is negligible. At the other extreme lie cases of chronic offenders, for whom probation may be a brief restraint, but whose real reform is largely improbable. It is all too common for courts to grant probation for purposes of temporary restraint alone, and the practice tends to the disrepute of the probation system. Underlying the probation system, just as in all penal measures, is the community instinct of self-preservation, and when the endeavor for persistent reform becomes disproportionately expensive when compared with results, the basis for further effort vanishes.

Legislation which limits probation to certain offenses is also illogical; and attempts to classify probation results by crimes rather than by persons are misleading. It is the habit or tendency which should be sought for, and the particular crime is of consequence only in so far as its nature denotes such tendency. The anti-social tendency plus a prospect of reform are the bases for probation.

As to fitness of officers, a somewhat extended experience in selection in a large city court has satisfied the writer that suitable candidates are an extremely rare commodity, and that a proper

selection of probation officers is as important as the selection of the judge himself. Their qualifications have been thus described. "The ideal probation officer should possess sound judgment, tact, patience and zeal in the work, the ability to read human nature, sufficient adaptability to appreciate and make due allowance for varying results of temperament, history and environment. He should be one who knows how to lead rather than drive, but who can drive effectually if need be. He should understand the influences that determine human character and conduct for good and ill, as well as methods of moulding character and how to apply them. And above all, he should have a love for the work."[1] It is obvious that these qualifications cannot be had for the pittance which many states pay probation officers, yet an unsuitable officer is a poor investment for any community. Appointment is generally a function of the court. The importance of temperament and personality renders ordinary civil service methods of selection of doubtful value. In view of the growing importance of the probation system, it would seem advisable to inaugurate a method of preliminary training and examination, under the auspices of some specially qualified board, such as the probation commissions of Massachusetts and New York, and to give such board, if not the power of final selection, at least that of certification.

The urban court, if constructed according to the modern ideas of comprehensive unity, has the great advantage in the matter of selection of officers that the force may be made mutually supplementive. For instance, in the municipal court of Boston, the appointees, in addition to the majority of persons of common business experience, include appointments from the police force, several members of the bar, and an officer trained in parole work; and the public is now watching with interest the experiment of adding a physician who is also a specialist in psychology. The different lines of approach to the problems of probation which such a force brings with it result in discussions which cannot fail to prove mutually helpful, and to avoid stereotyped methods. A responsible department head, with large power, is an essential to best results.

In adequate supervision of persons on probation lies the very heart of the system, yet it is the part which is all too apt to be crowded

[1] Report of Committee on Adult Probation in *American Institute of Criminal Law and Criminology Journal*, vol. 1, no. 3.

into the background by the more insistent claims of preliminary investigation, court attendance and office duties. A division of the force may sometimes secure more adequate field work. Constant contact with the probationer is indispensable. This part of the probation system is so important as to warrant quoting at some length a summary of the directions in which the probation officer should exert himself:

> During probation, constant, judicious and helpful supervision, not reaching the stage of undue annoyance, is imperative. This involves a constant study of the probationer and his environment, and the enlisting of all agencies, social, charitable, religious and industrial, which can aid in the work of reform. The officer should help his charge to obtain suitable employment, to live under proper conditions, to associate with desirable companions, and avoid harmful influences. The officer should strive to gain the probationer's confidence and respect and at the same time to impress upon his mind that the relation must be mutual.
>
> He should not be content with aiding him to hold in check his criminal or evil proclivities during the time of his probation—proclivities which if still existent are liable to break out again as soon as he has escaped sentence —but should endeavor to help him to really reform himself. To this end the officer should endeavor to stimulate the probationer's dormant energies for a morally healthful and useful life; develop in him ideas of right living, duty and sobriety, and ambitions along desirable and laudable channels; change those impulses, points of views and attitudes toward life and society which are wrong; develop new mental habits in place of old ones; stimulate his confidence in his own capacity to control himself and to succeed in a new and useful life. The re-awakening of will power is an object of importance, inducing the probationer to depend rather upon his own effort and initiative than upon the officer. In sum and substance the officer should endeavor to build up a new character in the offender; to replace the perverted ideas, impulses and habits which he has acquired through his environment with a new stock, *i.e.*, to reëducate him along lines which determine conduct.[2]

Not over fifty cases per officer at a time is an ideal condition seldom realized in actual practice. It is partly a taxpayer's question, yet when to the actual earnings of probationers is added the excess cost of prison maintenance over production which is saved, the public can well afford to pay the much less cost of an adequate probation force. Publicity of actual figures along this line is to be desired.

Closely linked with the question of supervision is that of surrender, too often regarded by the probation officer as a confession

[2] Report of Committee on Adult Probation, *supra*.

of failure. Nothing could be more erroneous than the custom of gauging the probation work of a court by the number of surrendered cases, and assuming that the one showing the smallest proportion of such cases is doing the best probation work. Exactly the opposite is usually true. Few surrenders denote either an under-use of probation, or, more frequently, supervision so lax as to be valueless. Correct data of recidivism after discharge from probation would furnish a surer test.

The spread of judicial probation has been great in point of legislation, it having been authorized in forty-two states and the District of Columbia. In actual practice, Massachusetts is probably the only state in which all authorized courts employ the system. Within a year or two, half of the counties in the state of New York had yet to put it in practice, and in many states it is little more than a name. And yet its growth in practice has been constant, and each year marks its use by a larger number of courts.

It is a matter of constant regret to the friends of the probation system that actual information about its practical workings is so meager and unobtainable. The system has passed the empirical and entered upon the scientific stage, and it is in danger of halting for want of sufficient data to make its future progress sure. Rule-of-thumb methods have bred diversity and anomaly. Their removal can be brought about only by intensive study and scientific deduction, a study of facts, and the facts in adequate detail and quantity are wanting. Legislation for compulsory reports in this, as in other matters of judicial work, is one of the needs of the hour.

One of the conspicuous dangers to the probation system is the habit of making it the dumping ground of measures, remedial or beneficial in themselves, but whose purpose is foreign, if not antagonistic, to the theory of probation. Massachusetts furnishes examples of such blunders. The first probation law required that probation officers should inform the court whether a defendant had been previously convicted. This has the advantage, more imaginary than real, of giving the probation officer a consecutive knowledge of the case. It has the much greater disadvantages, and actual ones, of encouraging in the probation officer, whose instincts should be those of a good Samaritan, the very opposite ones of a detective, and of identifying the probation officer too closely with the prosecution in the mind of the defendant, a very inauspicious

beginning for real reclamation service. This work of investigation is really vicarious work of the court itself, the selective process that precedes the granting of probation, the gathering together of the good and the bad in the defendant's make-up, a function not wisely left to the possibly one-sided scrutiny of the prosecution alone. It would be a boon to probation if it could be done by a distinct agency of the court. Another perversion of the functions of the probation officer is in the collection of suspended fines. The Massachusetts law directs that the fine shall be suspended and the defendant shall be placed on probation. The theory is still collection, but collection by delayed payment, a mere detail of method. The time and energies of a really good probation officer are too valuable to be spent in performing the duties of a mere collector. The argument that "supervision can do no harm" hardly touches the case; very likely a goodly percentage of the entire population might profit by sagacious oversight. This collection work would also better be entrusted to some other agency of the court. The sooner such anomalies are sundered from the practice of probation, the better for the probation system. They have served their purpose as temporary makeshifts, and their further retention is justifiable only in courts where the volume of business precludes a proper division of labor. What is here said of course does not apply in the relatively rare case in which the payment is purposely and wisely made a part of reformative treatment.

The future seems to promise for probation one of two very dissimilar courses, either its retention as part of the judicial structure and machinery, or an expansion of the Wisconsin method of transfer of all cases on probation to a central agency, independent of the courts. There may be predicted, as an early sequence of the adoption of the latter course, a limitation of the judicial function to the mere determination of guilt, transferring to another authority the dispensing of retributive measures, or their suspension for reformative purposes. The system of judicial probation demands for its preservation that there be secured a better appreciation of the justifiable limits of the probation system, more uniformity of application, more cohesion between the various steps of reformative treatment, less of the variations born of the present myopic mania for creating isolated specializing courts, which from their very isolation breed antagonisms of theory and practice, and the

creation of which runs counter to the modern ideas of court unity. The benefits of specialization, which can be retained by divisional courts, are now more than offset by the dangers of autonomy.

The Wisconsin method is a half-way measure. It makes for uniformity of treatment, probably also for economy; but it has the very serious defect of divorcing the judges, upon whom still rest the duties of selection for probation and sentence on surrender, from the means of that intimate knowledge of reformative methods and results which is indispensable to a proper use of the selective process. It may be that it marks an evolutionary step toward the creation of a sentencing board, and there are even now surface indications in Massachusetts of the rapid growth of that idea. Of course such a plan looks not only to the removal of variations in the granting of probation, but also to the lack of uniformity, and sometimes of sound judgment, in actual and final sentences. Indeed, the latter is probably the more urgent reason for the proposed measure. The adoption of such a plan of course means the end of probation as a judicial function.

The writer is yet to be convinced of the wisdom of such a radical change. Even in so small a state as Massachusetts, the number of cases which would pass annually under control of a sentencing board could not be less than 100,000, probably many more. This would inevitably require much subdivision of labor with a consequent tendency to variation and abuse hardly less than the present system discloses. Such a board would also lose in large measure what is often one of the best means of determining disposition, the story of the crime as disclosed at the trial. A wider grant of power to state probation commissions, a more efficacious method of disseminating among judges information of reformative methods employed both in probation and in penal treatment, and above all, the closer approach to uniformity which is a necessary sequence of the present movement toward a greater unification of the judicial system—these would seem to promise the safer correctives for the present shortcomings in the practice of probation. The lack of uniformity in present sentences can be adequately met by giving prison commissioners a wider power of revision of sentences.

THE JUVENILE COURT MOVEMENT FROM A LAWYER'S STANDPOINT

By Edward Lindsey,
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The lawyer is apt to look at the juvenile court movement simply as it is expressed in the statutes passed by many of the state legislatures and commonly referred to as "juvenile court laws." He sees a somewhat heterogeneous mass of legislation which has no apparent correlation with the general legal system. Aside from questions as to the constitutionality of such statutes he will look in vain for reported cases arising under them and will probably dismiss the subject as one of the fields which the general legal system has failed to cover. Yet the cases which arise and are disposed of under these statutes frequently involve fundamental legal principles, for questions of status are the most fundamental of all legal questions and just here lies the especial interest of the juvenile court movement to the legal student. By questions of status is meant those questions which pertain to the relations of individuals to each other and to social and political groups, such as the family, the state and society in general. All rights and obligations pertain to persons either by reason of the person's relation to some group—from the mere fact of his standing in that relation—or because of some contract or agreement between himself and some other person or group. Questions touching the criminal law also arise. The statutes themselves and the movement which caused their enactment show little conscious consideration of the legal principles involved. They are, of course, the expression of certain theories for social betterment rather than of social experience or practice. These theories relate largely to the class of questions touching the criminal law. In defending these statutes and maintaining their constitutionality the object of the statutes is usually stated to be to prevent juveniles continuing in a career of crime or becoming criminals by reforming them and furnishing proper training for them. This seems to be the dominant note and the original one. In Pennsylvania the act of 1901 is generally referred to as the first juvenile court act. But

in 1893 an act was passed providing that no child under sixteen years of age under restraint or conviction should be placed in any apartment or cell of any prison or place of confinement or in any court room during the trial of adults charged with or convicted of crime, and that all cases involving the trial and commitment of children for any crime or misdemeanor in any court may be heard and determined by such court at suitable times to be designated therefor by it separate and apart from the trial of other criminal cases of which sessions a separate docket and record shall be kept. This class of ideas seems to have been an extension of the ideas of treatment of criminals developed by the philanthropists with the object of reformation largely in view, and based partly on determinist theories denying free-will and responsibility for crime and partly on directly opposite theories of the value of training in developing the will. When these views as to the treatment of criminals became common they were naturally applied to the treatment of juvenile delinquents. The extent to which questions of status are involved however, has been largely overlooked.

As before stated, there is no legal literature except on the question of whether constitutional provisions are infringed by the statutes. There is a considerable literature of the movement, propagandist in character, of the nature either of panegyric or of criticism and for the most part based not on actual observation and study but on preconceived theories. A careful and impartial study of the operation of these statutes is much to be desired but does not yet exist. Some general statements with regard to their operation are justified but cannot be made too confidently.

Most of the statutes referred to have been passed within the last fifteen years but, as has already been indicated, it would be a mistake to suppose that they originated spontaneously within this period; indeed there is much less that is entirely new about them than is generally supposed. What is new, I think, falls chiefly under two heads: (1) providing increased administrative machinery for the application by the courts of established principles and recognized powers, such as the suspension of sentence and probation, the results of which have been generally beneficial and (2) the entire disregard, as far as the statutes themselves go, of established legal principles and the absence from them of any limitations on the arbitrary powers of the court, which always involves dangerous possibilities. Con-

sideration of the whole movement shows that the juvenile court as we now have it is the result of the operation of two opposing tendencies, one of which may be called the socialistic tendency, manifested in the various statutes, the other the individualistic tendency, manifested in the attitude of the courts toward these statutes, frequently declaring them unconstitutional, but now modified by the vigorous support of the statutes. Considerations of space prevent a comprehensive survey of the ground to show the basis of this conclusion; a few points and instances only can be briefly indicated.

In 1867, the Illinois legislature in "an act in reference to the Reform School of the city of Chicago" provided that in the case of any child under sixteen "destitute of proper parental care" or "growing up in mendicancy, ignorance, idleness or vice," any judge of the superior or circuit courts if of opinion that "his or her moral welfare and the good of society require" should commit such child to the Reform School. This act was declared unconstitutional by the supreme court of Illinois in 1871 in the case of People *vs.* Turner. In the opinion Judge Thornton considered the act repugnant to parental rights but based the decision on the constitutional right of a minor as well as an adult to liberty, except as punishment for crime. He said:

> It is claimed that the law is administered for the moral welfare and intellectual improvement of the minor and the good of society. . . . . If, without crime, without the conviction of any offense, the children of the state are to be thus confined for the good of society, then society had better be reduced to its original elements and free government acknowledged a failure. In cases of writs of habeas corpus to bring up infants, there are other rights beside the rights of the father. If improperly or illegally restrained, it is our duty *ex debito justitiae* to liberate. The welfare and rights of the child are also to be considered. The disability of minors does not make slaves or criminals of them. They are entitled to legal rights and are under legal disabilities. . . . . Can we hold children responsible for crime; liable for their torts; impose onerous burdens upon them and yet deprive them of the enjoyment of liberty without charge or conviction of crime? The bill of rights declares that all men are by nature free and independent and have certain inherent and inalienable rights, among which are life, liberty and the pursuit of happiness. . . . . Shall we say to the children of the state, you shall not enjoy this right, a right independent of all human laws and regulations? It is declared in the constitution, is higher than constitution and law, and should be held forever sacred.

The Turner case is typical of many others during the next thirty years. The various legislatures passed numerous acts in which can be traced the fuller development of the socialistic idea that the abstract political entity we call the state is a sort of artificial parent of all minors with rights over them superior to any rights of the natural parents or of the minors themselves; that it is the duty of the state to control and supervise the education both mental and moral of all children and for such purpose may dispose of their custody, fix their status and confine them in an institution provided only the primary purpose be not punishment for something done but reformation or improvement.

This legislative tendency was long resisted by the courts from the standpoint of the rights of the minor himself. The tendency of the courts was individualistic and to support the right of the minor to his liberty as against the state except after conviction of crime, subject only to the rights of parents. In all questions as to the custody of children the courts adopted as a basic principle the good of the child and treated the minor as the subject of rights and duties and only under certain disabilities. The attempt has been made to cite this chancery jurisdiction at common law as a ground for sustaining the statutes under discussion. For example, in an address before the American Bar Association in 1909 on the juvenile court, Judge Julian W. Mack cited some early cases of the chancery protection of infants as affording the legal ground for sustaining the juvenile court jurisdiction. This theory, however, is entirely erroneous. Very different notions are involved. The chancery jurisdiction was always exercised for the protection of the individual rights of infants in respect to their persons or their property and not as asserting against either the paramount authority of the state. It originated in the feudal relation of lord and vassal and was first exercised principally to secure to the king his feudal dues. The extension of it in this country was purely individualistic and to supply the want of natural guardianship and to vindicate the rights of the minor as against the state as well as individuals. It appears, however, that this erroneous theory has had considerable influence over courts in sustaining statutes framed on entirely different and opposing theories.

In Pennsylvania the act of 1893, before referred to, was held unconstitutional in one of the counties and the decision was acqui-

esced in. In 1901 a complete juvenile court act was passed. This act was held unconstitutional by the superior court in Mansfield's Case, 22 Sup. 224, on the grounds that it created a new court, was insufficient in title and offended against the constitutional provisions that no person shall for any indictable offense be proceeded against criminally by information and that trial by jury shall be as heretofore. Another act was passed in 1903 which avoided the objections as to creation of a new court and as to title but in other respects was more flagrantly in conflict with constitutional provisions than was the act of 1901. Nevertheless in the case of Comw. *vs.* Fisher, 27 Sup. 175, the superior court (two judges dissenting) held that the act of 1903 "offends against none of the provisions of the constitution." This decision was affirmed on appeal to the supreme court, 213 Pa. 48, the court saying:

> To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature may surely provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. . . . . There was no trial for any crime here and the act is operative only when there is to be no trial, the legislature denies the child no right of a trial by jury for the simple reason that, by the act, it is not to be tried for anything. The design is not punishment nor the restraint imprisonment.

But this is merely begging the question. According to this decision the constitutional guaranty against deprivation of life, liberty or property without due process of law is limited to persons actually brought to trial for crime. It is impossible to escape the impression that the public opinion favoring this legislation had infected the court and that in the opinion it is endeavoring to find a legal ground for sustaining the act, but without conspicuous success. The supreme court of Illinois in 1905, in People *vs.* McLain, with reference to the Illinois juvenile court act, said:

> If this enactment is effective and capable of being enforced as against the relator, father of the boy, it must be upon the theory that it is within the power of the state to seize any child under the age of sixteen years who has committed a misdemeanor, though the father may have always provided a comfortable, quiet, orderly and moral home for him, and have supplied him with school facilities, had not neglected his moral training, and had been and was still ready to render him all the duties of a parent.

It would seem that constitutional safeguards as far as minors and the relation of parent and child is concerned have completely broken down. Many of the provisions of the juvenile court acts are clearly in conflict with constitutional provisions and this conclusion can only be escaped by evasions. In the case of commitment to an institution there is often a very real deprivation of liberty nor is that fact changed by refusing to call it punishment or because the good of the child is stated to be the object. The only logical theory for their complete justification is the extreme socialistic theory of the functions of the state. But this is only a verbal justification at most for in spite of sonorous language as to saving the child and affording it protection, care and training by the state, there has been scant provision for making good any of these so far as the state is concerned. What usually happens is that the child is handed over to some organization or institution (sometimes partly subsidized with state money, it is true) which in some cases does its work well and in others badly.

Perhaps it may be premature to regard the constitutional questions as settled. No doubt the courts have been right in refusing to declare these acts unconstitutional in their entirety and not all the features are discussed in the decisions. The questions presented in most of the cases have been predicated upon parental rights and these have been presented as though they were purely private rights. It is strange that the public nature of the rights involved has been so little recognized. It is also true that in the majority of cases involved the parties are unable through poverty or ignorance or both to make a contest. The statutes are of course general in terms. In the McLain Case, *supra*, it was argued: "This law applies, with equal force, to the son of the pauper and the millionaire, to the minister's son (who is sometimes the wolf among the flock), as well as to the son of the convict and the criminal." As a matter of fact, however, it is not applied to the dominant social class and if ever it is so applied it will undoubtedly be largely modified. It may be that a period of criticism will succeed the period of encomium as to these statutes and that then the features really out of harmony with our existing legal system will be eliminated. There are some indications of the development of a critical attitude. In commenting on the Monroe County (N. Y.) juvenile court act Mr. T. D. Hurley, of Chicago, who was identified with the early juvenile

court legislation in Illinois, in an article widely copied in the public press, says:

> Throughout the law the state is made supreme master over the child. The parent is only incidentally considered; he is not made a party to the proceedings, nor is he charged with neglect or inability to care for his child. The state is made to occupy the position of primary parent with rights superior to that of the natural parent. This is a false and vicious position to take. There is no law or authority to substantiate this doctrine. The rights of the parent are superior to those of the state, and, until the parent forfeits these rights the state cannot interfere with his control or custody of the child. Parental rights should not only be protected, but, as far as practicable, preserved.

Archbishop Glennon, of St. Louis, has been quoted as follows:

> We have the right to preserve our homes from state control. We have the right to remain free and not to become tenants of a soulless state. We utterly abhor the doctrine that the little children who bless our homes shall be wards of the state, common property. The idea of common parentage is not only the end of order, but the end of civilization itself.

It would not be difficult to eliminate the features of these statutes which conflict with constitutional provisions and general legal theory and still retain all the valuable features so that they might fit into our legal system and not be, as they are now, extra-legal expedients. The system of probation and the whole administrative system provided for enabling a court to exercise supervision over the delinquent juvenile are generally appreciated as valuable and will be still further improved. The vague and unlimited nature of the powers granted to the court would seem to call for some further definition and specification. It is to be presumed, of course, that the court will act in accordance with legal principles. It has, however, been proposed to constitute laymen and women juvenile court judges. This has been opposed on the ground that legal training is essential for a judge in the juvenile court as well as in any other. In regard to such a proposal the supreme court of Utah said in Mill *vs.* Brown:

> The judge of any court, and especially a judge of a juvenile court, should be willing at all times, not only to respect, but to maintain and preserve the legal and natural rights of men and children alike. . . . . The juvenile court law is of such vast importance to the state and society that it seems to us it should be administered by those who are learned in the law and versed

in the rules of procedure, to the end that the beneficent purposes of the law may be made effective and individual rights respected.

But everything should not rest with the personality of the judge. While with the right man in the right place the very indefiniteness of his powers may be productive of immediate good, in the long run it will be just as unsafe as experience proved it to be in the criminal law. The corporal punishments and other abuses that have developed in some of our juvenile courts are sufficient indications of possibilities. The desired result might, of course, be reached through the decisions of the courts themselves. For reasons partly indicated above, however, few cases come before the appellate courts and if juvenile court judges formulate their decisions in writing these do not find their way into the reports. It is not impossible that judicial decisions may become more prominent in connection with this class of cases, but some modification of the acts themselves would seem desirable.

There is too a confusion of functions in these statutes. The view is gaining general recognition that the juvenile court should not have jurisdiction in the cases of dependent children. Where the case is one only of relief because of poverty or misfortune there is no question for a court, and such cases can be far better dealt with by the administrative agency of the poor directors or similar officials and agencies. But beside the question of dependency there are the distinct fields of crime and status embraced in most juvenile court acts. The child who comes into court accused of crime inevitably stands on a different footing from one who is there merely from parental neglect or from incorrigibility—and should. All criminal questions should be dealt with by a criminal court. Every child accused of crime should be tried and be subject to neither punishment nor restraint of liberty unless convicted. No child should be restrained simply because he has been accused of crime, whether he is guilty or not. Of course if there is no denial of the charge there is no necessity for a trial; but there can be no objection to having the criminal charge tried in the criminal court. There need be no punishment. If convicted he can then be turned over to the juvenile court to determine in a proper proceeding, with the rights of all parties safeguarded, whether a change in his custody or status would be for his best interest. We should then have the juvenile court dealing only with questions of status, with questions of the

custody and the control of the child. It may be that criminal trials of juveniles should be held at special sessions, but the separation of the consideration of the fixing of the status of the child from the consideration of his guilt or innocence of a criminal offense would be advantageous. There seems to be a tendency to bring all questions of family status into one group before one court, the so-called courts of "domestic relations." Theoretically there is much to recommend this scheme but its value remains to be demonstrated in practice.

THE TREND OF THE JUVENILE COURT

By Thomas D. Eliot,
Portland, Oregon.

Workers and thinkers in the field of the juvenile court have, consciously or unconsciously, divided in theory and in practice during recent years. By contrasting sharply their differing views, and by noting the various courts with these contrasts in mind, the writer purposes to bring out certain conclusions as to the present trend of the juvenile court as an institution. An analysis of the functions performed at present by juvenile courts will show to what extent the differences in their policies are reconcilable.

One group of workers tends to expand the court's work to include many different services as the need arises or the budget allows.

Another group wishes to limit the court's functions, or to transfer them entirely to other agencies. There are two conspicuous lines of thought in this second group, each equally plausible, which at first sight, however, seemed to the writer mutually exclusive. On the one hand, there is the statement that the functions of the juvenile court should be taken over by the school system. On the other hand is the argument that they could better be performed by fusion with a domestic relations court, handling the whole family unit.

I

Before passing judgment on these groups, let us review the courts themselves for facts which seem to point in one or another direction.

In the courts of the following cities have been developed one or more specialized lines of social work in connection with probation: Washington, D. C.; Richmond and Brooklyn, N. Y.; Newark and Elizabeth, N. J.; Pittsburgh, Pa.; Cleveland, Columbus, Toledo, and Cincinnati, Ohio; Louisville, Ky.; Indianapolis, Ind.; Kansas City, Mo.; Denver, Colo.; Salt Lake City, Utah; Los Angeles and San Francisco, Cal.; Portland, Ore.; Seattle, Wash.; Vancouver, Winnipeg, and Toronto, Can.; Chicago, Ill.; Minneapolis and St. Paul, Minn.; Des Moines, Iowa.

The list of activities differentiated from or grafted on to the probation department includes placing-out and employment agencies, clinics, educational classes, recreational groups and camps, relief measures and pensions. I have included above those courts which are so closely allied with some organization performing these functions as to make the two a single institution for all practical purposes; such as the Juvenile Probation Association of Brooklyn or the "Auxiliary" of the San Francisco court. Many probation offices not included here constantly perform some of these services for their charges, but have not developed special facilities for handling any one kind of need.

Juvenile courts in many places, chiefly in the middle west, have features partaking in some way of the nature of domestic relations courts. The New Jersey, Ohio, Philadelphia, Indianapolis, Michigan and Utah courts are in this group. In other places opinions are openly advocated which point in a similar direction. Among these are Pittsburgh, Louisville, St. Louis,[1] Grand Rapids,[2] and Chicago.[3] Contributory delinquency and dependency laws, the jurisdiction of which is now almost everywhere placed in the juvenile court, also point toward the intimate connection between juvenile and domestic relations courts.

Of the attempt to transfer or force back different phases of probation work upon other agencies there are examples, not always deliberate or clear-cut, in Boston, Springfield (Mass.), Newark, Baltimore, Indianapolis, St. Louis, Denver, Oakland (Cal.), Seattle, Minneapolis, Chicago, and Grand Rapids. The report of the Hotchkiss committee on the juvenile court of Chicago (1911–1912) contains perhaps the best statement of the thesis that the juvenile court is an educational institution.[4] The proposals of the so-called Levy bill in New York, and of Mr. Willis Brown, formerly of Salt Lake City and Gary, Ind., for transplanting the juvenile court bodily to the school system, are not by any means carefully or consistently worked out, but they are significant indications of a tendency in this direction.

[1] Report, 1912–1913.

[2] Report, 1912.

[3] *The Survey*, May 11, 1912; *The Criminal Law and Criminal*, September, 1912.

[4] See also paper by Prof. W. E. Hotchkiss, in *Proceedings of National Conference of Charities and Corrections*, Cleveland, 1912.

It will be noted that I have not attempted to align the courts into three distinct groups. Several present apparently conflicting evidence. As a matter of fact, few of them have any theory at all about what they undertake. Some frankly claim that local circumstances must control their policy exclusively.

As typical of the first group, however, might be mentioned the juvenile court of Salt Lake City. From them comes the following:

> We are convinced, through experience, that juvenile court work naturally divides itself into separate and distinct departments as follows: (1) The apprehending department; (2) the investigating or segregating department; (3) the judicial department; and (4) the probation department.
>
> Each department has its own particular duties to perform and is supervised by a head of the department, with all departments, with the exception of the judicial, being under the general supervision of the chief probation officer. . . . . In our judgment, the investigating department is a most important one and should be so equipped as to enable it to make a thorough investigation of the physical and mental conditions of the child, also the home environment, the neighborhood environment, the school conditions, ... About three-fourths of the young offenders brought into our court are settled by the investigating department and one-fourth go before the judge. . . . .
>
> In my visit to the convention of charities and correction at Cleveland, Ohio, last June, I was very greatly surprised to find a great majority of juvenile court workers contending that the apprehending of minors does not belong to juvenile court work. It seems to me that such a view is absolutely wrong and tends to narrow instead of broadening our field of action. I sincerely trust that public opinion will not favor such a contention.

As examples in the second group I shall cite the New Jersey and St. Louis courts; the former leaning toward fusion with the domestic relations court, the latter a clear-cut instance of the transfer of former court work to other agencies, notably the school system, to their mutual advantage.

The New Jersey law (ch. 360, laws of 1912, p. 630) reads:

> 1. In all counties of this state where there is or may hereafter be established a county juvenile court, said court is hereby vested with jurisdiction to hear and determine all disputes involving the domestic relation, the jurisdiction over which is now or may hereafter be by law vested in any court of this state except the court of chancery and the orphans' court.
>
> 2. By disputes involving the domestic relation is meant all complaints for violation of an act entitled "An act concerning disorderly persons" (Revision of 1898). . . . . where the gravamen of the complaint is the failure or neglect of one member of a family to satisfy or discharge his legal obligations to another member or members of the family, and all charges against any per-

sons for abandonment and non-support of wives, or children, or poor relatives . . . . *provided, however,* that nothing in this act shall be construed to confer upon such court jurisdiction to hear and determine any criminal complaint . . . . except as provided by law.

3. The jurisdictions of courts now authorized by law to hear and determine any of the matters herein referred to shall not be curtailed or affected . . . . but the county juvenile court shall have jurisdiction in such cases concurrent with such courts; *provided, however,* that any such cause pending in any other court, excepting the court of chancery or the orphans' court, may be transferred to the county juvenile court by the order of the judge of such court having first obtained jurisdiction, or said cause may be transferred to the county juvenile court upon the application of any party complainant or defendant provided such application is approved by the judge of the county juvenile court. . . . .

4. . . . . process may be served in the same manner as provided for the service of process in other cases in which the juvenile court has jurisdiction.

. . . . Approved April 2, 1912.

The following from St. Louis are the best statements of the "forcing back" policy, by the only probation office which has followed it consciously and consistently:

. . . . I am today filing a petition handed me . . . . in the case of R——— N———. In doing so and in defense of my position in this particular case, I want to take the opportunity of explaining what I feel ought to be the coöperation between the public school system and the juvenile court.

I think you will grant that truancy and incorrigible school conduct are a problem for the educational authorities. If you grant that, you will also grant that a child, in appearing before the court for such causes, is a confession of failure on the part of the school system. This failure may be due to causes for which the board of education can enforce no remedy. It will then become necessary to call on the court of law to put through a plan which may have been laid down by the attendance officer, principal, or teacher. It is not fair to the judge to bring before the court a truant and present at the same time only the fact of truancy. A report ought to be made, preferably written, or presented verbally, presenting a social diagnosis and prescribing a remedy. If the trouble be environmental the boy may be forced by court order to live with relatives who could give him a better home. If it be a "gang" problem the family might be forced to move. If both of these remedies have been applied and have failed, an institution may be needed. If such a report is made there is no reason why the attendance officer should not appear before the court in exactly the same light as a probation officer, and his recommendation received in the same way. At least such recommendations will prevent the child's being placed on probation, as was intended in R——— N———'s case. You will certainly agree with me that that is a useless disposition. The court ought to act on the theory that any delin-

quent care received from the attendance officer should have been given careful thought and effort from a social service viewpoint. You certainly will grant that there is no inherent power in a probation officer as such which makes him better to handle a case than an attendance officer. Such a disposition will only mean a duplication of effort and I believe a shifting of responsibility.

Again,

We are getting away, I think, from the individual case, and we are realizing more and more that to be efficient the juvenile court must simply be an eye for the community, through which to see the social diseases as they affect children.

The object of the juvenile court which understands its mission in a community is, not to punish the children which come under its jurisdiction, but to point out the weak spots in the community to the agents for social uplift, to the end that these districts can be reached before it becomes necessary to bring the children into correctional institutions.

II

Confusion would result if one were to try to guess the trend by merely counting courts. Conclusions must be based upon the relative effectiveness of different policies, and upon a careful study of the functions performed by juvenile courts.

The first juvenile courts, like many American penal reforms, were emergency measures, occurring at the point of greatest abuse. Children were being tried and jailed with and like adults. The juvenile judge replaced the criminal judge, the jail gave way to the detention home and probation officer, and lo! a new institution, the juvenile court.

Probation was hailed as the keystone of the new system. In the chancery courts it was founded on the ultimate power of the state to take guardianship of its children. Probation and the juvenile court became as a result practically inseparable concepts. No one thought of separating or transferring them.

When probation officers began to grapple with cases they found that every one represented the failure of one or more other social agencies to reach the child in time. Nay, they often found that the agency which should have kept the child normal simply did not exist.

Juvenile delinquency is a sort of precipitate of all such forms of maladjustment. The probation officer was forced to become a jack-of-all-trades or first-aid man. He secured for the child shoes, job, club, book, medicine, as the case demanded, in addition to supplying

the primary need of moral education. Usually he had no time or thought to go deeper than the immediate need of individuals.

Wherever a community is especially lacking or inefficient in its child-caring equipment of a certain sort, whether institutional or legal, children needing that kind of care are likely to get into trouble in large numbers. Many a court, alert to such an immediate need, has at once undertaken to meet the emergency with special funds or facilities for the purpose. Assuming the premises that probation belonged to the juvenile court, and should meet all needs of the abnormal child, the above is the logical proceeding. However, if this be granted, no line can be drawn short of a court administering all the children's charities: as a sort of "department of maladjusted children," many of whom might have been kept normal had the community shouldered the task in time. Some courts actually state this as their ideal. They are all things to all men. But the theory leads in practice to makeshifts, overlapping, and friction, and to inefficiency because of the natural limits of money, staff, time and strength.

Now it is noticeable that there is not one of the special tasks taken up by different courts working on the expansion theory but what has been successfully handled somewhere by other and purely administrative agencies, for the most part by the school. In the cities, for example, where there is adequate medical inspection in schools, we find less need of a juvenile court clinic.

Education is essentially a process of restraining, releasing and directing organic energy. Clinics, recreational and employment facilities are now recognized as legitimate parts of this process. Even the detention of children for observation and investigation is increasingly recognized as educational in its purpose. Probation, in the light of these facts is seen to be nothing but a special kind of moral education by a specialized teacher, carried on with the aid of other devices equally educational in their essence.

The question at once arises, why should a child have to be brought to court in order to receive proper educational treatment?

A conservative criminal lawyer might reply, "Because he is accused of transgressing the law, and the facts must be reviewed." But at the basis of the juvenile court, resting on the old precedents in the courts of chancery, is the theory that it is not an act which is to be punished, but a condition which demands remedy, in regard to which the court is adjudging the rights of the disputing parties. Of

this condition the child's acts are simply the evidence and the guide to proper measures for the welfare of the child, who is assumed to be legally non-responsible.

A court represents society's powers of adjudication and compulsion. Its action ordinarily implies a dispute of rights or conflict of interests; otherwise it is outside its regular field, and is really acting as an administrative agency. Only, then, where rights are contested should it be necessary to bring a child's case to court in order to get the treatment needed to keep it normal.

If this be true, much of the juvenile court's business is entirely unnecessary. In the earlier days of some courts, they were swamped with cases which were brought in, not as to a court, but as to an all-healing philanthropic institution. Blundering attempts have been made in some instances to cut down the numbers. The less abnormal children, or rather the "minor offenders," regardless of condition, were sifted out, but frequently no provision was made for their no less real needs. The flood of minor cases should have made it obvious that something was wrong with a school system which failed to supply a demand for advice and help such as the juvenile court was supposed for a time to furnish *ad libitum*.

Many courts have continued to encourage this panacea notion by their willingness to shoulder the failures and leave-overs of every other institution. Large numbers of parents voluntarily bring their children to such courts. Boys even offer themselves for advice, and the practice is hailed as a victory. Furthermore, the practice of "handling cases out of court" has spontaneously become widespread, a majority of cases being so handled in certain courts. This means, that when cases can obviously be handled by common consent, they are taken on "unofficial probation" or other services are rendered without trial.

Such work shows the great need of public but non-compulsory agencies of special education, to which wayward children may voluntarily be brought for advice or even for voluntary commitment. But unofficial probation work also obscures and handicaps the court's legitimate work, and should be forced back on other agencies where it belongs. There are enough cases which cannot as yet be so referred to other agencies, to occupy the entire attention of any existing probation force.

Assuming now for the moment that all cases capable of non-judi-

cial settlement have been eliminated from the juvenile court, we have left those legitimate cases in which there has been a refusal to follow the wishes of the administrative agencies attempting to help the child, and the rights of the parties must be reviewed in the light of the child's condition. But is there any more reason than before why a court should actually administer the educational remedy? In cases of ordinary compulsory education and of commitment to reformatory schools it is quite capable of turning over the matter of treatment to other authorities.

We must admit, then, that the first juvenile court which attached to itself the machinery of treatment, nay, even the first chancery court that undertook the care of minor wards, made, theoretically speaking, a mistake. We may fully appreciate the value of the personal work done with these methods, and the wisdom of their use as a temporary expedient, but at the same time may find the makeshift poor social economy in the long run. While there is reason in having a court pass on the exercise of the state's power of *parens patriae* when it is disputed, yet there is no obvious reason that the power should be exercised by the court itself, nor that its exercise be a compulsory act. It is already exercised by school and reformatory alike.

When the juvenile court began, probation directly replaced the jail or reform school. The leap of imagination from jail to education was too great to be bridged at once. Now, school systems have developed special detention schools, some of which admit only by court order; while prisons have become increasingly educational. But for the fact of a court record, the dividing line is no longer. This "court record," with which is associated an absolute stigma in the minds of many, is the arbitrary line remaining between what are essentially only different kinds of special education. Society has decreed that certain kinds shall have the stigma of at least nominal compulsion, while others shall not.

The logical working out of our theory demands, then, that any educational agency, whether it be house of refuge or school for normal children, be allowed to admit without trial children voluntarily offered to them, when the conditions seem to warrant it. On the other hand, agencies should not be obliged to wait in disputed cases until a child's condition is seriously abnormal before being able to call on a court to sanction their plans for its welfare. A court should have power to take cognizance of cases in which the abnormality is ever so

slight, provided the treatment is disputed. The record of compulsion by society is thus becoming a relative and no longer an absolute stigma. Already many juvenile court laws (for example those of Utah) allow jurisdiction over conditions and acts which are not recognized as transgressions by the adult laws.

This whole theory may, moreover, with equal logic be applied to the adult courts, for there are also adult reformatories, adult probation, and adult educational institutions for supposedly normal persons. We already commit insane and some inebriates without trial. Prison colonies may become increasingly educational in character and administration. We may even venture the remote possibility of a certain percentage of voluntary commitments to them, duly authorized and recorded through a proper administrative bureau, whereas ordinary disputed cases would still pass through the courts.

III

In the case of the adult court, if all matters of treatment be turned over to administrative authorities, there is still for the court its legitimate function of adjudicating the rights of legally responsible individuals. In the case of juveniles, however, the theory holds them not legally responsible. It is not the child's rights which are at stake, it is his condition which is being looked into.

If, then, a trial implies disputed rights, whose rights *are* being decided in a juvenile trial? In cases of educational treatment voluntarily agreed upon, the child has naught to say; his "rights" are not considered, it is a question of his welfare. Parental authority is sufficient when it is undisputed. When, therefore, the facts or plans in a given child's case *are* disputed, the contest is in reality between the right of the agency or institution and that of the parent, to retain custody and administer treatment. If this be so, why should any child be *tried*, or even be present at trial, except as a witness?

Here, at last, we approach the ground taken by those who advocate on grounds of expediency the fusion of domestic relations and juvenile courts. The family is increasingly becoming the unit of educational treatment or rehabilitation. Non-support and contributory delinquency laws are a recognition of this principle. The custody of children is a domestic relation, and, if disputed, its adjudication should be a trial of the parents' rights, even if the amount of

business forbids the actual combination of "juvenile" and other domestic jurisdiction under the same bench.

Thus we see that, by breaking up the function of the juvenile court into that of adjudication and that of treatment, two theories of its possible future, apparently irreconcilable, are synthesized. Together, the ideas of treatment exclusively by administrative agencies and of adjudication by a domestic relations court shear the present juvenile court of any theoretical excuse for existence. They lead to a policy of gradual contraction and self-abolition which every institution handling abnormal people might well adapt and adopt, a policy in marked contrast to the expansion theory of the juvenile court, that of the first group mentioned.

If the theory here outlined is found to work as well in the future as it bids fair to from current examples, the juvenile court will prove to have been an interesting and valuable experiment, but a passing stage to something far more thoroughgoing and effective. Instead of taking itself for granted as a necessary evil or even as a joy forever, it will find its greatest present usefulness in the interpretation of its work to the public, pointing out to other agencies their weak spots, and gradually forcing back the responsibility for child-care upon the normal institutions of home, school, and church, where it belongs. In turn, the court will continually hold up the hands of the social worker by sanctioning wise plans of family rehabilitation.

JUSTICE FOR THE IMMIGRANT

By Frances A. Kellor,

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The United States government has recently spent over $700,000 in a comprehensive investigation of immigration. One volume is devoted to crime. This consists of more than 400 pages containing an analysis and classification of crimes based upon court records. There is no attempt made to analyze the provisions of the laws violated nor the manner by which these violations were made into court records through legal procedure. In fourteeen volumes which the Immigration Commission devotes to industrial conditions, no mention is made of the administration of justice in small industrial communities, of which there are thousands, made up largely of immigrants.

The investigation of peonage in the South opened the eyes of Americans to the way in which justice can become subservient to industrial necessities and business expediency. It is no part of my purpose to discuss the use or abuse of laws during labor disturbances. That investigation is already under way. But what Americans should wish to know is whether the laws as at present administered in times of peace are giving the immigrant equal protection. We look upon courts as places of punishment and the immigrant regards them with fear. In reality they fill a much larger place than this. They are the educational centers through which men, whether complainants, defendants, witnesses, or hangers-on, receive their lasting impressions of fairness, justice and equality, and in accordance with which they become law-abiding, right-minded and right-feeling citizens, or go forth with hatred in their hearts, curses on their lips and the desire to make war on a society which denies them justice.

The immigrant does not start the race fair with the American. We expect him to know the multitude of laws and ordinances and regulations in a strange country with the institutions and customs and organization of which he is unfamiliar. We expect the peasant to adjust himself immediately to a complicated city system. We

expect him to learn to be law-abiding technically as well as intentionally with the heavy handicap of not knowing English. All this notwithstanding, as a government, we do nothing to instruct him or inform him, either when he lands or goes into our industries, as to his responsibilities or duties or obligations. We are content to leave this to the padrone, the immigrant banker, the notary public, the saloon and to such associates as he may find or friendly welfare associations as he may chance upon.

It is inevitable under these conditions that the administration of justice should in many instances bear one relation to the alien and another to the American. I am here concerned more with a system of law enforcement which makes injustice, subservience to business interests, dishonesty and the perversion of justice easy than with the corruptness of the men who administer the laws.

In the brief space at my disposal I hope to call attention to a few of the conditions found in the course of my investigations, which I hope will lead to such a study of our statutes and procedure as will restore the equality of the law, and will lead to an analysis of criminality among aliens which will include among its causes and explanations the content and administration of laws.

To what extent the present administration of law affects the statistics of crime, unjustly brands ignorant offenders as criminals or confirms them as such, perverts their sense of justice and destroys their respect for law and order, are unanswerable questions, in the absence of such information. We are approaching the time when convictions for violations of ordinances such as traffic regulations, sanitary codes, health laws and similar measures of precaution, violations of which do not imply criminality, will not be tried in criminal courts, but in municipal and other civil courts where fines and not imprisonment will be the chief penalty imposed.

Justices of the peace and police justices. These influence the life of the immigrant most directly. The way in which the law treats his every-day frailties in such matters as drink, disorderly conduct, vagrancy, trespass, assault and battery, petit larceny, and his civil differences with his neighbor is the immigrant's measure of the effectiveness and fairness of regulation. The way in which it treats his complaints of wages unpaid, oppression, and regard for his personal rights and property is a guide to his future actions in relation to his fellows.

New York may be taken as more or less typical of the prevailing system. Justices are elected, not appointed, and are therefore removable only by the appellate division of the supreme court through a long and difficult process. This is further safeguarded by requiring a bond from the person making charges, to be available in case of the failure of such charges. Under this system justices are responsible only to the board of supervisors in matters of depositing fines and receiving fees and are usually members of the town board. Under an appointive system direct responsibility would be established. The common use of these offices as political awards tends still further to lower the standard of qualifications.

Any male citizen, other than a tavern keeper, over 21 years of age, is eligible to office regardless of any general or legal education of any kind. This justice with no knowledge of law, or specific qualifications, is entrusted with power to issue warrants, administer oaths, take testimony and deprive defendants of property by imposing fines, and of liberty by imposing sentences not exceeding one year.

Justices receive no salaries and are paid under a fee system which puts a premium on delays and convictions. The uncertainty of the fees provides so precarious a livelihood that such justices usually have other occupations. There is no prohibition against their being employed by the industry upon whose continuance the whole community frequently depends. Teamsters, machinists, or clerks of such companies fill such positions.

Fees are based upon certain acts specified by law which include among others the following: Issuing summonses and warrants, swearing jurors, drawing affidavits, swearing witnesses, every necessary adjournment of cases, entering sentence of court 25 cents, and for record of conviction 75 cents, and for services when assisting other justices $2 a day. All fines are deposited with the town clerk and the law prohibits the retention of any part of these. This system encourages delays, multiplicity of papers, adjournments and convictions. In one court where 60 cases were examined one-third of the sentences were suspended, permitting the collection of the additional fee for record of conviction.

The rules of evidence which safeguard defendants in other courts are not observed, corroboration is not required in serious

offenses like larceny, interpreters are not furnished and complainants and constables are permitted to serve as such.

The power of justice courts in some states is broader than is generally known. They may have such questions as constitutionality of the law argued before them but rarely take cognizance of it. They may stay proceedings, if the parties appear and state that they have received satisfaction, providing the reason for the stay is set forth in the records. This makes it easy to use the powers of the justice to compel settlements upon threat of fines or imprisonment, if he so desires.

In New Jersey the practice is to collect fees directly from the litigants. The law of 1898 provided that no fees should be allowed justices unless the person against whom the complaint was made was convicted. In 1901 this was amended so that a justice who filed a bill of particulars of costs to the clerk might be paid if there was no conviction. An investigation in a number of counties showed that this law was not being enforced. In other words, the administrators of law violated the provisions governing their own offices. In some of the largest cities of the state the justice has no authority to try the case but issues the warrants which must be paid for when issued. This has led to the common expression among the foreigners: "I am going down to buy a warrant against you." An investigation of 38 warrants issued by one judge showed that only 7 were held for trial.

In making the following statement of notable instances which came to my attention among others, I wish to make it clear that under the present system hundreds of justices are administering the law fearlessly and honestly and with due regard to the rights of all. At the same time, I wish to point out that the system is such that it depends upon the man elected and not upon the laws which govern his office and the manner of his election whether his office is an instrument of justice or a tool in the hands of those who wish to oppress, exploit, and intimidate the ignorant immigrant unfamiliar with American laws, institutions and customs. That these officers are being used for such purposes there is abundant proof. The contempt in which the office is held; the use of it as a reward politically; its frequent isolation from publicity centers; the clan spirit with which the American element holds together, preventing publicity; the race prejudice existing in small towns; and the isola-

tion of the immigrant by districts and by language increase the necessity for every safeguard being afforded by these courts.

The writer was called upon to investigate a small industrial community in which it was alleged that oppression, extortion and graft prevailed in the administration of the justices' court. The company practically owned the town except the saloons. It employed one of the justices and its counsel was county judge. A saloon-keeper and a padrone were the interpreters when one was needed. It was found in the case of both justices that bills and claims for fees have been presented to the supervisors and paid which the docket did not substantiate; that they had failed to file records as required by law; that they had falsified accounts and settled cases in violation of law, there being no record kept; that they had neglected to transmit the fines to the clerk within the time specified by law; and that they were incompetent as shown in their conduct of trials. I submit briefly the records of several cases showing what occurred in that village, and the connection between the saloon-keeper, the policeman, and the justices.

The defendant was employed as a domestic by a saloon-keeper who also acted as the court interpreter. She left his employ without notice. He threatened "to get even" with her and later accused her of stealing $90. She was haled before the justice who compelled her to settle under threat of jail. Aside from the accusation of the saloon-keeper, no other evidence was taken.

The defendant was arrested during a fight and was ordered to pay $15 for a torn coat and $12.50 for "court expenses." Only the complainant's testimony was taken, yet both he and the defendant were each required to pay $5 for the interpreter.

Two defendants testified that they had been arrested and "sentenced" to settle a claim of $50 for apples picked by their wives. They paid $40 in court and paid the balance to the policeman. In addition they paid "$12.50 costs."

A complainant in a case testified that after being assaulted by the defendant he paid the local police officer $12 ($6 for himself and $6 for the justice) in order to have the defendant arrested and be found guilty. The latter was arrested the following day and was fined $5.

The defendant did not buy his beer for a christening from the saloon-keeper interpreter. He was thereafter arrested for violating some Sunday law, and was fined $75 by the justice.

The complainant in a civil action for breach of contract brought before the justice testified that he had rented a boarding house from the saloon-keeper interpreter. As the latter's saloon was not patronized by the complainant's boarders, he shut off the water supply for the house. The complainant

was forced to move and sold his furniture for $245, receiving a deposit of $100. The saloon-keeper advised the purchaser not to pay the balance and sent word to the complainant that unless the deposit was returned, he would have him sentenced to jail. He returned the deposit and sold his furniture to another for $180, receiving a $50 deposit, but the latter was also advised by the saloon-keeper not to pay the balance. The complainant appealed to the justice, who later gave him $23.33 as his share of the amount collected, although the purchaser testified that he had given the justice about $60. No record could be found of the disposition or settlement of the case.

The defendant was arrested on a charge of assault in the third degree. The interpreter called the defendant outside of the court room and informed him that the justice said it would take $55.35 to "settle the case," otherwise he would be sent to jail. The defendant, the justice and the interpreter then went to the latter's saloon where a check for this amount was made out to the order of the interpreter who testified that he gave the justice the full amount thereof in cash. The justice then returned to the court room alone and paid the complainant, who had been told to wait for him, the sum of $31.50, for which he signed a receipt according to the latter's sworn testimony. The justice's docket when examined later contained the entry "Guilty: sentence suspended, has two small children: no funds," and showed that the costs had been assessed at $3.80. After deducting the interpreter's fee of $3, there still remained $20.85 unrecorded and unaccounted for. While this investigation was being conducted, the complainant was compelled to sign a new receipt for $45, while the defendant was advised to leave town and threatened with discharge from work.

A dispute as to the non-payment of a debt of $10 had arisen between a saloon-keeper and the defendant. As the latter was about to leave the village en route abroad, he was arrested at the railroad station at 10 p.m. and immediately brought before the justice, who forced him to pay the sum of $19. The difference between the debt and the amount paid was in reality in the nature of a "fine" as the costs in all cases are charged to the town.

The defendant had been arrested on a charge of petty larceny. He paid the justice $5 out of court and when the case was later called, was informed he was discharged. The docket however read that sentence had been "suspended," thereby making him guilty of the crime. As a matter of fact, the defendant should not have been originally charged with the crime, as an employee had actually taken the money in question, each individual being responsible for his own individual acts.

Warrants of arrest for assault in the third degree had been issued against 6 persons. Only four had been apprehended, yet the other two, according to the docket were noted as "Guilty: sentence suspended."

These justices are holding office today. The investigation was completed in the summer when the supreme court vested with the power of removal was not in session. The owners of the industry involved took advantage of this, and as they were the political leaders of the county and

the main taxpayers their interference was successful. Some of the complaining witnesses were dismissed and as there was no other industry near, they left for parts unknown; affidavits were subsequently obtained under duress in which they denied their testimony. They were intimidated, they were bribed to leave town and the action for removal was delayed on one pretext or another until the whole case was rendered so weak that successful prosecution was doubtful. Never was a better case presented on behalf of the recall of judges which would have permitted the facts to have been laid promptly before the people. As it was, even publicity was denied as the county papers were also under the control of the owners.

In another case four men complained that they had been illegally arrested for petit larceny. Six immigrants left an employment agency in New York September 22 to work on the construction of a dam for a large paper factory. Their fare of $3 by boat and 75 cents for meals and the fee for the job were to be deducted from their first wages. They arrived about 10 a.m. September 23 and were to go to work on the morning of the 24th. They were told by the padrone that they could have no food until they paid for it. Two of them had money but the four others did not. The four were given a piece of bread and some sausage which was all the food they had from noon September 22 until the morning of September 24 when they refused to work without breakfast and went away. The justice was employed as machinist by the company and the superintendent said he wanted to make an example of them for not working out their fare and they were arrested and sentenced to 30 days in jail, but were promptly released on habeas corpus proceedings brought by the state bureau of industries and immigration.

The following letter from an alien in Pennsylvania is of interest:

> In this county, and particularly in this borough, it has become the practice of justices of the peace and others who are aiding in the scheme to extort money in various ways from the foreign people. One of the principal things practiced is to bring them in before the justice of the peace on some criminal information, whether they have violated the law or not, and then demand large sums of money from them under the guise of a settlement, and then let them go, or in some instances hold them for court expecting that they will still pay more money, and if so, then manage to get the case *nol-prossed* without a trial. Others who seem to live upon what they can extort by some means from these foreigners, have a practice of going to them and demanding

money under threat that if they do not pay they will be taken to jail. It is very hard for any one located here to get a hold on the people who are practicing these things, for they are combined together, and threaten the foreigners if they tell these things.

The following case, among many others, was submitted in support of this statement:

In December, 1912, a Pole was arrested for selling liquor without a license and when brought before a justice was informed that the case could be settled for $200 for the complainant, and $100 as costs for the justice. The Pole could not, or did not put up the money, and the justice was about to send him to jail, when an accomplice in the foreign exchange department of a bank made an offer to go bail for him if he would go home and bring up his bank book so that he could fix the bank account to protect him for going his bail. This was arranged, and the Pole went home but did not come back with the bank book, but went away, and was not in the county for about six months.

When this accomplice learned that the Pole had left, he and the justice between them issued a warrant for the arrest of the wife of the Pole, when the justice had no information against her then or at any other time, and placed the warrant in the hands of a member of the state constabulary who went to arrest her. The Catholic priest and railway agent at that place interceded for her, and found her handcuffed in her house waiting until train time and under the custody of the officer. The priest called up the justice on the phone and asked him whether he would not accept him as bail for her, and allow her to remain at home, as she had three young children there and no one to care for them if she was taken away. He replied that he would not accept the priest as bail, but if she would turn over her bank book to the officer she might remain at home, and if not she would have to be brought to court, and the three young children with her if necessary. She had no bank book to put up at that time, and the constabulary took her and her three small children to jail. The accomplice met them near the jail as the officer was bringing them in, and said to her, "Now you will stay in jail." This was on a Saturday evening, and they all were placed in jail and remained there until Monday some time, when he got uneasy for fear the humane agent would get to know about it, and went with a woman to the jail and proposed to take the children out and take them to the woman's house. The children cried, and then they took her and the children all out to the house of this woman, who kept a sort of restaurant in the town. Here they were kept for about two days and hounded for money or a bank account.

Naturalization. The admission to citizenship is the highest honor which this country can confer. No act should be so free from exploitation as this. The federal government has established a high standard of qualifications. But in addition to this a number of states have passed laws making the earning of a livelihood depend-

ent upon naturalization or the obtainment of first papers. This immediately opens the door to graft, encourages dishonesty and makes naturalization not a high privilege but a condition precedent to going to work. This results in wholesale evasion of the law, which is a part of the early education of the newly arrived alien, whose first introduction to America is as a protected law breaker. These laws apply primarily to employees on public works and to trades in which a license is required. In New York City, this restriction has led to wholesale frauds and exchanges in licenses and there are records showing that the little Greek boys who peddle flowers have been arrested as many as five times during their first few months in the country for peddling without a license. The padroni say it is cheaper to pay fines, as they cannot get licenses. The political leaders also turn this requirement to great advantage by assisting members of their clubs to obtain first papers and licenses, thereby controlling the voters. From among many cases this is of significance:

An alien had his first papers and wanted to get his final papers. A runner and shyster lawyer offered to get them for him. He turned over his first papers and paid $5 to the lawyer and was told to deposit $9 with a saloon-keeper as a guarantee. He was taken four times to the court and the lawyer demanded his expenses paid. The alien had no money and was asked to sign a paper which he found was used afterward to collect the $9 deposited with the saloon-keeper. Five dollars more was then demanded and he signed a memorandum agreeing to pay the runner for his services as follows:

Lost time, May 8, 9, 10	$6
One day lost, May 19	5
Spare time given to lawyer, May 28	4
Lost one day, June 11	5
Spare time given to lawyer, June 14	2
Spare time given to lawyer, June 18	2
	$24

At the time the case came to my notice he had lost his first papers, paid $14, lost several days' work, and had not obtained his papers.

The extent of these frauds is colossal. Bogus naturalization societies and schools for English have been found which are covers

for "ambulance chasers," insurance schemes, and land sales. One such society had over 3,000 persons registered.

There is a bill now pending before Congress asking for a commission to take up this whole subject and recommend adjustment of the inequalities and elimination of abuses, and I doubt if there is any subject more in need of such an investigation.

It is difficult to maintain a theory of equal rights for all in the face of some of the laws which have been enacted. It were far better in my judgment to maintain a strict and consistent policy of exclusion for the protection of American laborers than to discriminate against men to whom we have opened our doors, and who do not understand this version of justice. Such are the workmen's compensation laws where aliens are specifically excluded from becoming beneficiaries, or where non-resident families may not receive more than two-thirds of the amount payable to resident families, or where the amount for aliens is limited to a maximum of $750.

On the other hand, the establishment of governmental agencies looking toward the assimilation of immigrants has been strenuously opposed as discriminating and as tending to increase immigration. The past decade has seen, however, a steady development of such agencies. One of the most important of these is the establishment by New York state of a bureau of industries and immigration, which creates in effect an immigrants' court. This has the power to make investigations, hold hearings and make adjustments. This experiment has done more to reduce the law's delays, obtain justice and fair treatment for the immigrant and maintain his faith in American freedom and justice than any other one single experiment.

California has recently established a commission on immigration and housing with similar powers, and Cleveland has established the first municipal agency in the form of a city immigration bureau, which takes charge of all immigrants in need of information, advice and assistance.

It is through such measures and agencies as these that the alien will finally receive the full measure of justice which should accompany his admission, and it is to these we must look for a better knowledge and administration of our laws through the minor courts which bear so important a relation to the immigrant.

THE ALIEN IN RELATION TO OUR LAWS

By Gino C. Speranza,

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A native of one country who takes up his residence in another is obviously a political and national "misfit" in his new surroundings. Such "misfit" may be temporary or permanent, partial or complete, depending on a variety of causes, subjective or objective, some of which we shall have occasion hereinafter to consider.

An alien, as such "misfit" is technically called, is "fitted" into the body-politic, more or less successfully, by the highly conventional legal method of naturalization, and into the body-national by the subtler process of assimilation.

In countries of little immigration the problem of "fitting-in" aliens is of little practical importance, except that it occasionally calls upon diplomacy and international jurisprudence to disentangle some intricate questions of conflict of laws. But in countries like ours, where every year hundreds of thousands pour in from every part of the world, where whole villages and townships of peoples, alien to our history and race, are transferred from abroad, the problem of politically and nationally "fitting in" these outsiders is one of surpassing importance.

In older countries alien residents are, at most, such a small minority that their readiness to "fit" politically into the new jurisdiction, or socially and economically into the new environment is, in most instances, an interesting rather than a practical question; they are overwhelmed by mere force of numbers.

With us, instead, the question is eminently a practical one, and as such we shall study it from two distinct points: first, that of the alien trying to "fit" into the new country, and then that of our country trying to "fit" itself to this enormous alien mass.

The disabilities of an alien in a foreign land are either historical or actual. Historically an alien, entering a foreign state, was considered, if not an enemy, at best a suspicious person. With very few exceptions he was actively discouraged from staying in the new coun-

try and every obstacle was thrown in the way of his settling or owning property there. Commerce removed some of these obstacles, and international goodwill is destroying others.

The actual disabilities of aliens are due to differences between the life, customs, laws and language to which they are born and those they find in the country of emigration. They vary, practically, with each individual; they are accentuated by ignorance, inexperience, lack of courage, and profound differences in historical, political and social precedents.

All such disabilities, historical or actual, are met and their rigor attenuated in numberless ways; by culture and international exchanges, whether it be the selling of American machines for Italian marbles, or the mutual lending out of professors between universities of different countries; it is also met unofficially by benevolence, such as by immigrant and travelers' aid societies, and officially by national and international legal enactments. It is with this latter form of aid that we are here principally concerned.

The law has from ancient times recognized the disabilities of the citizen outside his native country and has endeavored to make up for them in sundry ways. The oldest of these is the creation and recognition of the consular office and the gradual development of consular law. Friendly conventions and treaties between the commercial nations of the world and the development of diplomatic and international rights and obligations added strength to the protection thrown around the alien within a foreign jurisdiction.

It should be observed here, and constantly borne in mind, that this weighty structure of protection was built up in the course of those centuries when emigration from one country to another was sporadic and exceptional. But now let us examine at close range the workings of this venerable and high-sounding mechanism in overcoming the political and actual disabilities of an alien from one of the old countries coming today into our territory.

His government has had our official assurance by solemn treaty that he, though an alien, "shall receive . . . . the most constant protection" for his person and property. We have also recognized divers officials from his own country as accredited diplomatic or consular officers, and have guaranteed that they may have recourse to our own authorities "whether federal or local, judicial or executive . . . . . in order to defend the rights and interests of their countrymen."

Let us now take the not infrequent case of some simple peasant from some village of southern Italy, unschooled but intelligent, honest but totally ignorant of most of our municipal ordinances. Let us suppose that for the commission of one of these purely statutory crimes our alien peasant is arrested. Let us assume that when arrested he keeps his wits about him and demands an opportunity to communicate with his consul. What could the average official sent here by foreign governments do with the old-fashioned consular machinery at his command? Bear in mind that in one year the magistrates' courts of the first division of New York City committed or held for trial nearly 30,000 foreign-born persons; that they disposed of nearly 140,000 cases of which probably one-half were natives of some foreign country. Bear in mind also that the subjects of Italy who may apply for aid to their consular officers within the jurisdiction of the New York consulate number nearly 1,000,000 people. Bear in mind, further, that a substantial percentage of such subjects are illiterate and ignorant of our language, and many of them engaged in hazardous labor and not a few the easy prey of swindlers. Consider, also, that except in a few large centers like New York, Chicago and San Francisco, the consular officers of several countries having large numbers of subjects here, are assigned to jurisdictions covering territory more extensive than the geographical area of their native land.

Bearing all this in mind, what diplomatic or consular chancellery, organized to meet conditions of other ages and of well-settled countries, with administrative regulations enacted decades ago and a personnel trained in the old schools—what chancellery—I ask, can meet with any effectiveness the rightful demands of their subjects here?

Such old-fashioned machinery of extra-territorial assistance is rendered even more ineffective in operation by our dishonorable inertia in living up to our treaty obligations; that this government should covenant to protect a foreign citizen within its borders, and when the rights of such citizen are violated, we should plead our inability to protect him on account of the conflict of federal and state rights is conduct well deserving ex-President Taft's appellation of "pusillanimous."

On all sides, therefore, the laws which are intended to meet and attenuate the disabilities of the alien are more apparent than real, more high-sounding than effective. And it is not strange, therefore, that lynchings of foreigners have gone unpunished, that peonage

among immigrants has been not infrequent, that discriminatory legislation against resident alien labor is enacted and enforced and most of the time without challenge, and that the chancelleries of European cabinets protocol every year thousands of complaints from dissatisfied subjects in this country.

On the other hand, there are certain actual disabilities to which an alien is subject among us which it seems practically impossible to meet by any legal enactment. Take, for example, that very substantial handicap of an alien who, being charged with crime, and having the constitutional right of confronting his witnesses and of hearing the testimony adduced against him, can neither, in most cases, understand what is said against him, nor tell his own story except through the very imperfect medium of an interpreter. I have elsewhere pointed out how the interpreter service in our courts, in effect, often deprives an alien accused of crime of certain vital constitutional safeguards,[1] and in another paper I have endeavored to describe certain special forms of fraud to which immigrants are exposed for which no adequate remedy has been devised except in so far as the immigrant-aid bureaus in certain sections have brought some relief.[2]

The first of such bureaus was established several years ago by the Italian government as a quasi-legal office for immigrants in New York City, and others have since been organized in the larger cities substantially upon the plan of the New York bureau. While no official statistics of such offices have been published in this country, some idea of their workings and results may be had by reference to a report made to the Italian Colonial Congress held in Rome in 1911.[3]

Having briefly considered the disabilities of the alien in relation to our laws, let us now look at the other side of the question, at our own disabilities in fitting him into our body-politic and national.

What distinguishes our problem of adjusting the alien to our system, environment and national aspirations from a similar problem in other countries is not merely the great diversity of origin and condi-

[1] *Defects in the Methods of Securing and Using Interpreters.* Report of Gino C. Speranza at the annual meeting of the New York state probation commission, 1911.

[2] "The Relation of the Alien to the Administration of Law," in *Journal of Criminal Law and Criminology*, November, 1910.

[3] *L'Assistenza Legale degli operai Italiani nel Nord America.* Report of Gino C. Speranza to the Congresso Coloniale Italiano (Sezione Quarta) Rome, June, 1911.

tion of those who come to us, but their enormous numerical strength. The "fitting in" of one hundred thousand aliens presents not merely a more complex problem than is presented by the "fitting in" of one hundred, but a distinct and novel series of problems.

We have endeavored in various ways during the last twenty-five years to grapple with such problems by legislative measures which can be roughly divided into two classes: immigration and naturalization restriction.

Before 1882 we had no immigration laws to speak of. Since then a body of statutes have been enacted, variously interpreted and as variously enforced, which, in substance, aim to exclude the feeble-minded, the pauper, the criminal, the contract-laborer and the defective. Some of these statutes are so ingenuously drawn that it is not strange that many undesirable aliens come in, and some desirable ones are barred out.

Especially weak are those provisions of the law which seek to keep out the criminal and the anti-social. Granting that it is difficult to define in law what beliefs and acts shall stamp a man as anti-social, and even assuming, as our laws ingenuously assume, that when we ask the alien, on his arrival, to state his political creed and criminal history, he will answer truthfully, yet we may well challenge the effectiveness of the present test of "belief in organized government" as a measure of our political self-protection. May it not be asked whether even "belief" in "government" organized on an essentially different basis from ours might not be as dangerous to our national life as belief in anarchy or disbelief in "organized government?"

Here, again, precedents of the liberality of other countries in admitting political offenders, or in extending the right of asylum, are really not helpful; they fade into insignificance when their relatively sporadic character is examined in relation to the vast number of aliens who might seek to invoke them when endeavoring to enter our own country. The most rabid anarchist, or even a hundred of them, can be safely left at large in any well-organized, stable democracy. But can this be said of a hundred thousand? And a hundred anti-social men preaching freely in a country of long settled government, with old traditions and customs, and of a homogeneous racial population, are far less dangerous than a like number appealing to, and inflaming the imagination of thousands and thousands who are our "fellow-citizens" only by the most stretched courtesy, who know little or nothing of our government and less of our history.

I have taken an extreme example, although how even such an extreme case is actually possible has been pretty well demonstrated by certain excesses of the Industrial Workers of the World.

Another fundamental defect in our legal provisions for self-protection is that in most of the international agreements where we grant certain rights to, and assume certain obligations towards citizens of foreign states, the "reciprocal" rights granted and the "reciprocal" obligations assumed by foreign governments are reciprocal in form rather than in fact. For instance, the duty of protecting a million subjects of Austro-Hungary is a very different matter from the "reciprocal" duty of the dual monarchy of protecting a handful of American tourists traveling in that empire. So, likewise, it is of little moment to Russia how an American there may become naturalized, and the Czar need not worry over the possibility of ex-subjects of our republic becoming members of the duma and influencing the foreign policy of the empire. But in our country we have seen how a constituency composed largely of former subjects of the Czar may (and we are not concerned here with its wisdom or unwisdom) influence this government to abrogate a treaty with a friendly power.

Or take another and more recent instance of "reciprocity": about a year ago we agreed with Sweden that consular officers of each of the contracting countries should have the right to administer estates of nationals dying intestate in the foreign jurisdiction; thereupon all foreign states with whom we had agreed to grant "the most favored nation" treatment claimed the same right. The result has been that consuls of countries at the opposite end of Europe, like Greece, Italy and Austria, with very large colonies here have practically excluded our own state officials from administering yearly hundreds of thousands of dollars left here by deceased aliens, our courts being obliged to allow clerks and agents of such consulates to earn the commissions fixed by our laws for our administrators.

Another situation calling urgently for relief as a measure of self-protection is the indifference of many of our naturalized citizens to the spirit and political intent of such naturalization. This indifference to the practical obligations of the oath of allegiance is indirectly fostered by the paternal interest of some foreign governments in their emigrant subjects abroad. The emigration laws of Italy and Austria, for instance, excellent and humanitarian as they are, nevertheless effectively keep the immigrant here in close and constant relation with

the fatherland. Alleging the necessity of protecting him because of his ignorance, the emigration officials of such foreign governments follow him from the moment he sails from Europe, and even after he lands here watch paternally over his needs. At home they relax the rules regarding military service so that young men may feel that they can return, even if they have violated the military law; and in certain places, political elections are arranged with due regard to the season when immigrants from the Americas generally return home. An eminent member of the Italian Parliament, commenting on the recent elections in Italy under the new law which extends the electoral franchise to certain classes of illiterates, writes in a quasi-official journal that the striking fact in such elections in the south of Italy (whence most of the new voters come) is that "the *Americani* who, until now, were interested in the political life of only one country—the United States—have been able for the first time to contribute to the formation of the national legislature," and he adds that deputies from such southern provinces assured the writer that "the *Americani* threw themselves into the electoral battle with great vigor."

Granted that there is nothing sacred in what are popularly called Anglo-Saxon institutions, yet if we believe in the great system of self-government developed and stubbornly fought for by the English people through centuries of training and struggle, we may fairly claim that its continuance and stability will depend on a citizenship attached to, and understanding its spirit and history, and in sympathy with its political ideals. Against the influence of great masses of peoples coming to us from every part of the world, with traditions, history and training totally different from ours, most of them belonging to an honest but ignorant and unschooled class, and a very large number of them wholly unused to self-government, we may justly invoke as a measure of legitimate self-protection the provision for a longer and more rigid apprenticeship before granting to aliens the electoral franchise. An Italian observer, trained in our laws and with a wide, sympathetic experience among his compatriots here, has recently urged the advisability of making the term of such apprenticeship fifteen years.[4] I do not think this excessive, though I believe that provision should be made for shortening the time of such appren-

[4] Robert Ferrari, of the New York bar, in the *Journal of Criminal Law and Criminology*, November, 1913.

ticeship on proof of special educational training, or of public, or quasi-public, services rendered.

After this rapid review of a vast field, let us briefly point out certain remedies that suggest themselves for the problems that confront us. To begin with, our laws, both in their national and in their international provisions, should define and recognize the peculiar status of that individual whom we call "immigrant" and whom we consider as subject to very special disabilities, but who, in the eye of an outworn jurisprudence, is merely an alien subject. Nor must we longer hold to the belief that we can adequately protect him or ourselves by exclusively national measures, or by the old international guarantees which contemplated facts and conditions unlike those which exist today in countries of large immigration.

International conferences should be urged by the United States with a view to such agreements as already exist, for instance, for the international protection of laborers, minors and women-workers, between certain states of continental Europe. Special immigration conventions should be sought by which, on the one hand, the possibilities of rejection and the hardships of deportation might be eliminated, and, on the other, the guarantees of foreign coöperation in keeping the criminal and the undesirable out of this country might be strengthened.

Above all, we need an effective strengthening of our laws regarding naturalization. Opinion may differ as to whether we should further restrict the number and character of those who wish to come to our shores; but there can be no substantial disagreement as to the necessity of restricting the right of American citizenship to those aliens only who show by length of residence and by reliable tests of right conduct, that they are fairly entitled to participate in our government.

THE ADVISABILITY OF A PUBLIC DEFENDER

By R. S. Gray,
San Francisco–Oakland, Cal.

The insufficiency of our modern judicial system to meet the demands for justice can hardly be questioned by the well informed. This situation is being remedied by many methods, an example of which is the enactment of workmen's compensation acts to displace judicial procedure based upon the law of negligence. Nevertheless, the substance of our present method of determining disputed matters involved in so-called crimes, torts and other justiciable wrongs, will doubtless remain for a long time to come. No matter what our theories may be, we have the spectacle in all ordinary criminal trials of a more or less unequal combat between society on the one hand and the individual or banded individuals on the other. If the defendant is innocent he is able ordinarily to establish the fact only at a frightful cost. If the defendant is poor and friendless, the chances of his escape, even though innocent, are small and, if guilty, the chances are great that his punishment will be excessive. Under our system of jurisprudence, almost every criminal proceeding is attended by an injustice, the toleration of which is inexplicable. We say that the presumption of innocence attends the defendant in a criminal trial at least until the case passes from the hands of the advocates, yet bringing to bear upon the accused all the power of organized society to convict even before trial, we compel the accused, if possible, to provide his own defense at his own full cost and risk, and we turn the tribunal, which should be dispassionately seeking only the truth, into a battlefield for the mighty or a slaughterhouse for the weak. At least in all criminal proceedings the accused should be given by the state what the husband is compelled to furnish the wife accused of infidelity, adequate means of defense.

That defense will not be adequate unless afforded by an official secure from fear or favor. The administration of injustice by the private detective should cease. From the moment a man is arrested the state should, without request, afford him official counsel equal to and coördinate in every respect with that of the prosecution, for

in the eye of the law he is only under suspicion while presumed to be innocent, and at best at a fearful disadvantage. Certainly he should not be subjected to inquisition except in the presence of such official counsel.

The refusal of the state to provide for the poor and helpless as adequate counsel and advocacy as it provides for pressing its own charge is a burning shame for which it is difficult to find adequate expression. The state compels the weak to submit even in advance to the fear and terror of the powerful in their control over judicial proceedings. The state entangles the hands of every citizen in the mesh of the law, yet leaves him helpless if poor to either maintain or defend an action in court. The state refuses to make justice free to the multitude and practically shuts the door of justice in their faces, leaving them to a wolfishness of greed and heartlessness that it is difficult to believe exists, but which does exist and will continue to exist until there is a radical change in human nature itself. In the face of such a condition of affairs, the few that are rich and even the many that are comfortable fatuously wonder at the spirit of anarchy that flames forth ever and anon and which it is increasingly difficult to restrain.

The president of the Legal Aid Society of New York, speaking of thirty-six years' work, said: "In the City of New York alone we have by this time, taught over 380,000 lessons to that number of taskmasters," yet even he bewailed the inadequacy of such relief. Great as the work of the New York society has been, its greatest significance is the revelation of the appalling need for "justice" against "taskmastership," a need which it is evident the greatest of these legal aid societies can hardly more than make temporary shift to meet until the people at large, if not a sleeping and self-satisfied bar, awake. Members of the legal profession sometimes take much pride in the fact that courts appoint counsel for poor persons charged with crime, and that the poverty stricken who will make oath to their pitiful state may even sue *in forma pauperis*. The utter futility of such methods has given rise to legal aid societies, and one of the greatest advocates in the city of New York, confessing his own prior ignorance of the actual extent of such work there done, testified before the delegates of legal aid societies of the United States as to the "immense good to mankind, the immense good to this community, not only to the poor, but to the rich and substantial" done by the New York society.

In the *Bulletin* of the Chicago Legal Aid Society, published in the issue of October, 1912, of the *Illinois Law Review*, appears this comment: "We may hope that in time a direct appeal to a public official shall start the machinery of justice in motion, providing automatically for redress and defense without the present preliminary requirement of payment for professional services most needed by those least able to afford them. In the meantime it is the high privilege of legal aid societies to assist the unfortunate over the wall of procedure into the court of justice." What an indictment of our boasted civilization and especially of governmental agency in its most sacred function and office, that of doing "justice."

The English authorities hold that their poor prisoner's defense act of 1903 was not intended to "give a person legal assistance in order to find out if he had got a defense," or, in other words, have practically branded the act as saying he shall not have such help before and at the trial unless he has previously shown without any such help that he has a defense. Comment seems superfluous as to the dead-sea character of such fruit of statutory and judicial beneficence.

An inquiry lately came to the writer from the chairman of a committee of a Chicago bar association, asking for information "on the question of a public defender in general or in its application to a large city like Chicago." The inquiry was passed on to Hon. Wiley F. Crist, judge of department one of the police court of San Francisco, who has had experience in legal aid society work, and to Professor Elmer I. Miller, vice president and supervisor of history and political science at the California State Normal School at Chico.

Judge Crist replied as follows:

"I want heartily to concur with you that a public defender is desirable. My experience leads me to believe that a great many defendants in criminal actions could prove their innocence if they had capable counsel, but many cannot afford to pay the essential fees. In addition to this I believe there would be a great saving of expense to the taxpayer caused by trials in the superior court of persons unjustly charged with crime."

Professor Miller stated some of his reasons for believing in a public defender, as follows:

"1. No doubt poor defendants are often unfairly treated because their cases are not properly presented.

"2. The additional cost of a public defender will probably be more than offset by the saving in keeping innocent persons out of jail.

"3. Inequality before the law, due to the inequality of financial ability of persons to hire counsel, is notoriously great.

"4. The present system looks too much to victory to the powerful and too little to justice for the poor.

"5. This last situation must change or the rapidly declining influence of the courts with the masses of the people will soon reach a very dangerous point."

As to the need for a public defender under our present as well as the coming system of jurisprudence in criminal matters, careful study may well be given the article on "Public Defense in Criminal Trials," by Maurice Parmelee, Professor of Sociology, University of Missouri, published in vol. 1 of the *Journal of Criminal Law and Criminology*, and also Professor Parmelee's work on *The Principles of Anthropology and Sociology in their Relations to Criminal Procedure.* The paper by Robert Ferrari, of the New York City Bar, on "The Public Defender: The Complement of the District Attorney," published in vol. 2, p. 704, et seq., of that journal, also deals with the subject in an illuminating manner. At the present time, the provisions for defending poor persons accused of crime are totally inadequate. Probably few, if any, of the 380,000 lessons taught to "taskmasters" by the New York City Legal Aid Society, involved the defense in a criminal case. Perhaps the only statute showing anything like a recognition of the breadth of the duty which society owes its needy members is the freeholders' charter of the county of Los Angeles, California, which affords relief in civil, to some extent at least, as well as in criminal matters, under civil service system with an efficiency bureau and a well guarded recall. A full review of the charter provisions concerned may be found in the opening portion of a symposium on that and related matters prepared, at the suggestion of Dr. John H. Wigmore, by the writer and attorney Abram E. Adelman of the Chicago bar, for publication in the January, 1914, issue of the *Journal of Criminal Law and Criminology.*

THE WOMEN'S NIGHT COURT IN NEW YORK CITY

By Frederick H. Whitin,

General Secretary, Committee of Fourteen, New York.

To deal more wisely and hence more effectively with the social evil is the chief purpose of the women's night court; "women's" only in that the defendants are all females. For but one offense does the number of women arrested exceed that of men—prostitution, and even that included, 85 per cent of those arrests are men.[1]

During the winter of 1907, Judge (now district attorney) Whitman secured legislation which authorized a night court. The reason for such a court was the injustice which frequently was done persons arrested after the close of court, about 4 p.m. Until the courts had opened at 9 a.m. the following day, such defendants as could not give bail were detained in jail, so that many innocent persons were often held for twelve hours or more, for 40 per cent of those arrested are discharged by the magistrates. Bail unless given by a friend means a fee to a professional bondsman; the poor man has few friends with the necessary security and the fee is often more than the probable penalty. The principal sufferer from the professional bondsmen was the prostitute, the street walker. Arrested when her day's opportunities were best, she readily paid the bondsman's fee of $5. It was common talk that the fee went "three ways." The records themselves showed that the woman who did not secure bail was more likely to be convicted than one who did.

The first night court—it was for offenders of both sexes—was opened August, 1907. In 1908, 25 per cent (46,523 persons) of the total arraignments in the magistrates' courts of Manhattan and the Bronx were in this court. The inferior criminal courts commission of that year gave especial attention to this court and its recommendations represented the next development.

Two night courts were established, one for men and one for women. The chief magistrate may designate the magistrates to

[1] Report of Police Department, 1912, Arrests: Felonies—males, 17,066; females, 1,714; misdemeanors—males, 90,049; females, 17,178.

preside in the women's night court—the magistrates rotate in all the other courts. A system of fingerprint identification for prostitutes was provided in this court and an attempt was made to deal with the social evil from the side of disease. This was the famous clause 79 which required every woman convicted of prostitution to be examined by a health department physician and if diseased to be committed to a lock hospital. This clause was opposed because a possible step towards reglementation. It was declared to be unconstitutional not because of sex discrimination as was argued by its opponents but because the draftsman of the clause had written a mandatory "shall" instead of a permissive "may," thereby denying the defendants their constitutional right of a day in court. These were the commission's amendments peculiar to this court. It shared with the others the many benefits and improvements resulting from the legislation, the result of the commission's labors.

Each year since 1910 the law affecting the court has been widened and improved. Cases of soliciting, loitering and of tenement prostitution are now tried solely in the women's night court. The fingerprint identification has been extended to include cases of vagrancy and intoxication. The fine as a disposition in prostitution cases has been abolished and the age limitation (thirty years) has been removed for commitments to the state reformatory for women at Bedford. The cases of women charged with keeping disorderly houses or of committing prostitution in tenements (at present the most extensive form of the evil in this city) are now promptly tried and disposed of in this court.

With the increased interest in sex problems and in fallen women, the women's night court has attracted much attention. As the interest has resulted in giving assistance to the probation officer, Miss Alice Smith, it has been very acceptable, but as it has drawn a morbid crowd of men and women, boys and girls, it is much to be regretted. Some nights the theatrical sign S. R. O. (standing room only) is needed at the entrance. It is hoped that some legal way may be found to exclude the miscellaneous observers without violation of the constitutional right of public trial.

The chief magistrate has each year assigned four magistrates to sit regularly in this court. Judges Barlow, Herbert and Murphy have recently been re-assigned for the fourth year. To them, and to Miss Smith, is the credit due for the success which has attended

the work of this court. The much desired uniformity of sentence has been secured. Any woman, a first offender, who genuinely desires to leave "the life" finds here not one but many open doors to help her. There are, however, among those apprehended for the first time, some hardened offenders, and these Miss Smith speedily detects. The magistrates are guided very largely by her opinion as to whether the women shall be put on probation, sent to a reformatory institution or the workhouse. The woman who desires that those criminally responsible for her fall and life shall pay the penalty, finds at this court, ready and anxious to act, the judge, the attendants and the police. Cases occasionally occur where women familiar with the court because of their own arraignment there, come to the court in some hour of resentment and give such testimony that the man whom they have been supporting can be apprehended. More frequently Miss Smith or the arresting officer will get the girl's story and so a case against the man is secured. He has been even arrested in the court room itself. But the girl must give the necessary evidence and must not weaken on trial. It depends on her testimony whether the man escapes or whether he gets six months or a year in the penitentiary These are the cases of the pimps, men who live in whole or in part off the profits of prostitution. Compulsory prostitution is a felony and convictions before a petit jury (cases not tried in this court) are difficult to obtain if the complaining witness is a professional prostitute and jealousy or revenge can be shown to be a motive.

The work of this court shows plainly from the records. The first year for which detailed figures are available of the disposition of prostitution cases is 1907. These are from the report of the research committee of the committee of fourteen and the report of a special investigation by the city commissioners of accounts:

	1907		1913	
	Number	Per cent	Number	Per cent
Arrests	8806		3006	
Discharged	3227	37	347	11
Convicted	4579	63	2659	89

DISPOSITIONS

	1907		1913	
	Number	Per cent	Number	Per cent
Workhouse	999	18	2083	78
*Fined	3911	71	0	0
Probation	325	6	303	12
Institutions	18	0	237	9
Other disposition	226	5	36	1

* By a 1913 amendment to the law this disposition is no longer possible.

The comparison of the tables is striking. The number arrested has decreased two-thirds yet street soliciting has been much reduced. The percentage convicted has arisen from 63 per cent in 1907 to 87 per cent in 1913, despite the increased severity of sentence. Whereas 71 per cent of those convicted were fined in 1907 that disposition was impossible in the latter half of 1913. The proportion put upon probation has doubled while those sent to reformatory institutions have increased from an absolute few to as many and more than the institutions can accommodate. As probation is useless except in special cases, the workhouse commitment is the only recourse in the majority of cases, and this disposition has increased more than fourfold. The workhouse commitment can do the women no good even at the best and the New York City institution is the worst, yet detention there acts as a strong deterrent to any aggressive pursuit of "the life." Efforts must be made to improve that institution, for as it is today, the magistrates will not impose long sentences even on the repeated offender.

Since the adoption of the fingerprint identification system, complete records have been available. Since the records began in September, 1910 (forty months) 5,492 different women have been convicted of prostitution in the women's court. Of these 3,075 or 56 per cent have been convicted but once; they represent the casual, the woman who brought face to face with the penalties of "the life" changes her course. Many undoubtedly leave the life—the majority probably—others leave the city for places where repression is not so active while some avoid re-arrest. It would seem reasonable to consider the woman who is arrested over four times a persistent offender. These number 587, a relatively small proportion, their cases constituting 11 per cent of all convictions of this offense. These

are the women who should be permanently restrained since it is evident that they cannot or will not cease to be a social menace.

The complete record is as follows:

CONVICTIONS FOR PROSTITUTION (SOLICITING, LOITERING AND VAGRANCY—TENEMENT PROSTITUTION) AT WOMEN'S COURT. SEPTEMBER 1, 1910 to DECEMBER 31, 1913

Reported by Identification Bureau

INDIVIDUALS	CONVICTED	INDIVIDUALS	CONVICTED
3,075	once	47	eight times
966	twice	27	nine times
562	three times	24	ten times
302	four times	15	eleven times
200	five times	7	twelve times
144	six times	2	thirteen times
121	seven times		

The individual records of the two women who have been convicted thirteen times each—the highest so far—are of especial interest, and also show the details upon which the above tables are based:

RECORD OF CONVICTIONS AS A PROSTITUTE OF MARY SMITH

Fingerprint Bureau No. 107

DATE	DISPOSITION	CHARGE	JUDGE
October 22, 1910	Workhouse	Soliciting	Herbert
April 4, 1911	Workhouse	[2]Soliciting	Murphy
September 12, 1911	Workhouse, 5 days	[2]Loitering	Murphy
September 20, 1911	Workhouse, 5 days	Loitering	Herbert
September 30, 1911	Workhouse, 10 days	Loitering	Barlow
October 24, 1911	Workhouse, 10 days	Loitering	McQuade
November 11, 1911	Workhouse, 20 days	Soliciting	Murphy
December 26, 1911	Workhouse, 10 days	Loitering	Herbert
February 27, 1912	Workhouse, 30 days	Loitering	Murphy
April 11, 1912	Workhouse, 30 days	Loitering	Herbert
May 12, 1912	Workhouse, 30 days	Loitering	Herrman
July 7, 1912	Workhouse, 30 days	Loitering	Harris
October 5, 1912	Workhouse, 30 days	Loitering	Herbert

[2] When the charge is soliciting, the evidence shows such crime directly. When the charge is loitering, the crime is the same but is shown by circum-

RECORD OF CONVICTIONS AS A PROSTITUTE OF MARY GOLDEN

Fingerprint Bureau No. 1028

DATE	DISPOSITION	CHARGE	JUDGE
March 9, 1911	Fine, $10.00	Loitering	Barlow
March 9, 1911	Fine, 10.00	Loitering	Barlow
March 23, 1911	Fine, 5.00	Loitering	Herbert
April 30, 1911	Workhouse 10 days	Soliciting	Herbert
June 9, 1911	Fine, $10.00	Loitering	Barlow
June 26, 1911	Workhouse 5 days	Loitering	Herbert
June 26, 1911[3]	Workhouse 30 days	Loitering	Herbert
August 12, 1911	Workhouse 5 days	Loitering	Murphy
September 14, 1911	Workhouse 15 days	Loitering	Murphy
October 19, 1911	Workhouse 10 days	Soliciting	McQuade
March 22, 1912	Workhouse 30 days	Loitering	Barlow
May 14, 1912	Workhouse 20 days	Loitering	Herbert
December 30, 1912	Workhouse 20 days	Loitering	Herbert

It is of special interest to note that neither has been convicted for a year past, a year when the city has been a closed one to vice. What has become of them—in which of the possible classes they may be—is unknown.

The women's night court is doing its work in dealing with the problem of the social evil and doing it well. The next development is proper treatment of the persistent offender.

We must have a farm branch of the workhouse where the incorrigible and hopeless can be detained for long periods if not permanently and where by their work they can pay the cost of their maintenance. We need an industrial school, not necessarily a reformatory, where the women can be made economically more efficient. We must detain those who because of having a communicable disease are a social menace and we must protect those not able to care for themselves because of mental deficiencies. It is because of this tremendous problem, one great enough with abundant funds, but one which in fact must be handled with relatively limited means that

stantial evidence of the witnesses, with but few exceptions a police officer in citizen clothes.

[3] The second arrest on the same date was possible because she had had her trial postponed in the first case and had been released on bail. It was while so released that the second arrest occurred.

Mayor Mitchel successfully persuaded Dr. Katherine Bement Davis to leave the State Reformatory for women and to become the first woman Commissioner of Corrections in New York City. She has as great chance now as she had at Bedford ten years ago. May she succeed equally well!

THE OPPORTUNITY FOR WOMEN IN COURT ADMINISTRATION

By Mary M. Bartelme,
Judge, Chicago Municipal Court.

Judge Merritt W. Pinckney of Chicago had been upon the bench of the juvenile court but a short time when he realized that in order to do justice to the delinquent girls, the greatest need was to have their cases heard by a woman. He found that a very large number of little girls under 18 years of age were brought in on the ground of some immorality; that often the culprit was a timid little first offender, if offender at all, who had no understanding of the character or possible results of her act; that she often had been assaulted by a man whom she did not know and whom very likely she would never see again; that many times the act left her with a disease for which she should have immediate and persistent treatment and perhaps isolation; and that her parents or custodian might have contributed to her delinquency. In four cases, all heard within six months, in which the parents insisted that their child had had intercourse with men and must be sent to the State Training School and the child as emphatically insisted she had not had such relations with men, it was found on examination by a woman physician that the statement of the child was true, and the parents' request was not complied with.

It was evident to Judge Pinckney that hearing the child's case in a large public court room presided over by a man, whose clerks were men, and whose other occupants were men, women and children waiting to have the cases in which they were interested heard, or perhaps mere curiosity seekers, was not conducive to secure the facts from the child, or to do justice to her. He therefore appointed a woman to hear the cases of girls charged with delinquency. The hearings are now held in a small room with none but women clerks and with as few "outsiders" present as possible, and consequently the hearings are more in the nature of a dignified family conference than a court trial. Under such conditions it is far easier to obtain

the confidence of and a true and full statement of facts from the girl, and only when these are obtained can justice be done.

Personally, I believe it is easier for a woman than a man to obtain a true statement of facts from a little girl who is charged with theft. She intuitively feels that a woman will better understand the taking of some face powder or articles of dress or finery she deems so necessary during the years when she feels fine plumage and good grooming are essential to her success in the "game" of securing the attentions of the other sex.

A girl must have recreation and above all she should experience those greatest of all joys and desires in a woman's life, wifehood and motherhood, and if the means and activities that lead up to these cannot be obtained under the most auspicious circumstances, still they must be obtained. The girl, too, feels a woman will understand when she tells her that she is one of a family of seven living in three rooms, the largest of which serves as kitchen, dining and living room, where meals are prepared, cooked and eaten, where father is resting his shoeless feet and babies are being gotten ready for bed; that she cannot entertain company in her home and therefore does meet "fellows" on the street corners, in the park or at the movie.

It is the realization on the part of a girl that a woman understands and feels her needs and desires that makes her throw aside her timidity and secretiveness, give to the woman judge her confidence, and relate to her her struggles, her opportunities and her lack of them.

The intimate relation which a woman has with home conditions, with all domestic relations and with the unfolding of the child's character, its needs, its longings, makes it possible for her to put herself in the child's place and to understand her.

Personally, I believe a woman of good judgment and legal training should be able to handle more efficiently and justly than a man the cases that arise in a juvenile court, morals court or a court of domestic relations.

The introduction of women upon the police force in some of our large cities is one of the best innovations that could be made for the betterment and protection of the ignorant, unthinking or delinquent girl, who in a public place of amusement or recreation is accosted or spoken to, or herself approaches and speaks to a boy or

man whom she has never seen before. The appearance of a woman police usually causes the disappearance of the boy and the escort of the girl to her home by a woman.

It may not always be pleasant for women to render such service but it is a duty they owe to the home and the family, which have a right to such service.

A COMPARISON OF SOME OF THE PRINCIPLES AND RULES OF PRACTICE OF THE AMERICAN AND THE CANADIAN COURTS

By David Werner Amram,

Professor of Law, University of Pennsylvania.

The most notable contrast between American and Canadian procedure lies in the flexibility of the latter, due to the fact that it is created by rules of court and not by acts of legislature. In most of the United States legal procedure is of mixed origin. It is based partly on ancient common law practice, partly on rules of court, and partly on acts of legislature. It is the latter element which disturbs the symmetry of the system, and retards its natural evolution and efficiency.

In speaking of Canadian procedure I wish to be understood to be limiting myself to the consideration of the procedure in the province of Ontario. Quebec is the only one of the provinces of the Dominion which is still subject to French law, but, in its code of civil procedure the influence of the English system is apparent, for example, in the adoption of such writs as mandamus, injunction and prohibition. All of the other provinces are subject to a system of law and procedure which as to part of them (New Brunswick, Nova Scotia and Prince Edward Island) was brought in by the first colonists and as to one of them (Ontario) was adopted by legislative enactment in 1792. The other provinces (British Columbia, Manitoba, Alberta, Saskatchewan and the Yukon territory) are of later creation and subject to the rules of English law and procedure as modified by Canadian legislation and practice. Ontario has been the most progressive of the provinces and Ontario lawyers consider their system of procedure an improvement upon the parent system established under the English rules of 1883.

Procedural Legislation and Rules of Court

The Ontario judicature acts lay down broad principles, leaving methods of procedure to the courts. This is a principle of differentiation of function between legislature and courts for which many of

the best men at the American bar have pleaded for many years and which has often found expression in the reports and debates of the bar associations. The prescription of rules of court in acts of legislature hampers rather than promotes the efficiency of procedure. A court which makes its rules may modify them, so that through their too strict interpretation they may not lead to injustice. Where the rule is laid down by the legislature, the sound discretion of the courts cannot be exercised at all, and the rule of procedure attains the same dignity and inviolability as a rule of substantive law. The Ontario court finds itself unhampered by legislative interference, and is allowed free play for its wisdom to determine how the business of litigation can best be done, so that, to use the words of rule 183,

> A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

The powers of American courts should be further enlarged by the abolition of all legislative rules, so that procedure may be regulated entirely by the tribunals before which the causes are litigated. The danger that once existed at common law whereby rules of practice through long use became inflexible, need not be feared, for the ultimate power to correct an abuse would always remain in the legislature and could, in an extreme case of judicial obstinacy, be invoked.

The American people have learned to place their trust in legislatures, whether for better or worse I shall not say, and they have become correspondingly jealous of the normal powers and authority of their courts. The legislatures have in response to this feeling kept an eye on the courts and asserted a regulative supervision over them, sometimes in apparent trespass of the constitutional border lines that divide the legislative and judicial fields.

The interference of legislatures with the normal development of common law and procedure has served its purpose and has fully impressed its lesson upon the mind of all the ministers of justice on the bench and at the bar, and it may now be retired in favor of the older method of allowing the law, at least so far as practice and procedure are concerned, to be developed solely through the instrumen-

tality of its experts. No theory is more crude than that which maintains that our legislatures are more expressive of the public will and more responsive to public ideas of right than our courts. The courts are composed of judges and attorneys-at-law, who like all other men are impressed by the influence of the spirit of the times. Notwithstanding an occasional illustration of judicial insensibility to contemporary needs or tendencies, it remains true that judges express the ideas of right and expediency dominant in their day, modified however by the whole body of law and practice that has been handed down by tradition. For the individual in the pursuit of his own affairs, radicalism, modernity and self-expression may be permitted almost indefinitely; for a community of millions of people, social life must perforce be regulated largely by the rules made by the dead and not by the living.

The Single Court and Uniform Rules

The fundamental characteristic in the organization of the courts of Ontario is the single court, a supreme court consisting of two divisions, the appellate division and the high court division. The latter is the trial court for all causes. Every judge in either division is a member of the other,[1] and when necessary may sit and act as a judge of either of the divisions of the supreme court or for any judge who is absent or whose office has become vacant.[2]

In addition to the judges who sit continuously in the appellate division, five judges of the high court division are annually selected to sit as appeal judges for one year, so that there are at all times at least two appellate courts in session, and if necessary an additional temporary appellate court may be organized by the judges for the purpose of preventing the accumulation of cases not heard and the corresponding delay in final decisions.[3] The constitutionality of acts of Parliament or of the provincial legislature cannot be impugned until after notice has been given to the attorney-general for Canada and the attorney-general of Ontario, who "shall be entitled, as of right, to be heard either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding."[4]

[1] **Judicature act, sec. 8.**
[2] *Ibid.*, sec. 14.
[3] *Ibid.*, secs. 38, 39.
[4] *Ibid.*, sec. 33.

The lieutenant-governor in council annually convenes the judges for the purpose of considering the operation of the judicature act and of the rules of court and of enquiring into any defects which may appear to exist in the system of procedure or the administration of justice, and making the necessary changes in its rules or recommending amendments that cannot be carried into effect without legislative authority.[5]

The American system (barring some slight modifications here and there) is still a system in which multiplicity of courts with exclusive jurisdiction makes possible the all-too frequent miscarriages of justice on account of successful pleas to the jurisdiction, nor have we anything equal to the rule requiring the judges to meet annually to study their rules and their effect on litigation and the promotion of justice. The provision which makes the chief law officer of the state a party in interest in every case in which the constitutionality of legislation is attacked is one that will recommend itself by its essential reasonableness.

There being but one court for Ontario it naturally follows that there is but one set of rules of court. Uniformity in rules of court in the United States has been discussed by a number of bar associations. It seems to me that it would be possible and practicable for the supreme court justices in each of our states to promulgate rules for the courts of the state, precisely as it is possible for the supreme court of the United States to promulgate rules for all of the federal courts. Proper provision could be made for the special needs of different localities, due to difference in density of population, in distances from the county seat, in convenience of transportation, etc.

Appointment of Judges

The spectacle furnished by the United States in which the courts of justice are daily held up to criticism, ridicule, contempt and even vituperation excites unbounded surprise across our northern border. The people of Canada are satisfied with their judges and their administration of the law, and yet they have absolutely nothing to do with their selection or appointment.

The minister of justice, after consultation privately with such of the bar as he sees fit, recommends an appointee to the cabinet.

[5] *Ibid.*, sec. 113.

The bar in its collective capacity does not express any opinion; the legislature has nothing to do with the selection; the judges would not think of interfering with the choice or advising as to it. The choice of the man is made by the minister of justice and submitted by him to the cabinet. If the cabinet approves, an order in council is passed; if the cabinet disapproves, a further recommendation is made by the minister of justice until the cabinet is satisfied. The recommendation of the cabinet is made to the Crown and the appointment is thereupon made.

Barring an occasional protest in favor of more active participation by the bar in the choice of the judges, this system meets with approval. No litigant who wants his case decided simply on its merits, cares anything about the residence, race, religion or politics of the upright and able judge. Considering the excellent results achieved by judges elevated to the bench otherwise than by popular election, the American people may well study their local state systems without prejudice and under the conviction that other systems may be just as good.

Details of Procedure

In Ontario actions at law or in equity are commenced by a writ of summons, are pleaded to issue by a statement of claim, statement of defense, and, if necessary, plaintiff's reply, with full power in the court to allow any and all amendments that may be deemed necessary, and to bring in by third-party procedure any person or persons who may have any interest in the controversy. All persons whether interested jointly, severally or in the alternative may be joined as plaintiffs or defendants, and judgment may be given against one or more of the defendants, for one or more of the plaintiffs.[6] Several causes of action may be included in the same proceeding,[7] and if there are many persons having the same interest, "one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of all."[8]

It becomes possible under the Ontario system to dispose of the interest of all parties to a controversy in one action, and all differences between law and equity, contract and tort, right to property

[6] Rules 66 and 67.
[7] Rule 69.
[8] Rule 75.

or right to damages are merged in the fact that the controversy arises out of the same transaction and that all of the parties have an interest in the whole or some part of it. The effect of this rule is to prevent multiplicity of actions and reduce the amount of litigation arising out of a single transaction.

It was feared at one time by the bar of Ontario that this and other rules making for simplicity and speed would reduce the business of the bar, but the result has proved quite the contrary. The knowledge that all controversies arising out of a single transaction may be disposed of at one trial swiftly, justly and certainly has encouraged litigation. I have before me the calendar of the supreme court of Ontario, appellate division, for appeals entered for the month's session, commencing April 7, 1913. There are sixty-nine cases on the list, fifty-one of which are from judgments entered during 1913, that is to say, within three months of the date of the argument on appeal; thirteen within six months and five older cases antedating this period. Of the cases in 1913, five are less than a month old since judgment, thirty-one are less than two months old. The appellate divisions of Ontario hear and dispose of about 800 cases per annum whereas the average record of the supreme and superior courts of Pennsylvania is about 1,200 cases per annum. It will be seen therefore that in Ontario, with a population of about 3,000,000 as against a population of 8,000,000 in Pennsylvania, the appellate courts dispose of almost twice as many cases in proportion to population as the appellate courts of Pennsylvania. This should allay the fears of members of the bar that simplicity and speed would reduce the emoluments of the profession. The simpler the procedure and the more expeditious the trial the greater will be the interest of the public in this method of adjusting its difficulties and the greater the amount of business that the bar will be called upon to administer.

One of the startling methods for saving time is that laid down in Ontario rule 232:

> On all appeals or hearings in the nature of appeals, and on all motions for a new trial, the court or judge appealed to shall have all the power as to amendment and otherwise of the court, judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the court, or judge appealed to or as may be directed.

Under this rule, the court on appeal will hear testimony if necessary to supplement the record from the trial court instead of send-

ing the case back for retrial with all the attendant delay, cost and disappointment.

After pleadings are filed either party may be cross-examined by the other prior to trial upon the allegations therein.[9] This examination for discovery is necessary in three-fourths of all cases. By compelling disclosure of the real merits and defects of the case of both sides it promotes settlement out of court and saves the time and cost of trial; it also enables better preparation to be made and curtails the length of the trial.[10]

A series of similar rules[11] are those relating to the production of documents before trial whereby not only parties but also third persons may be compelled to exhibit for inspection papers alleged to relate to any matter in controversy. The theory underlying these rules is that no man shall be permitted to conceal any fact necessary to bring into light the real merits of the controversy, and the element of chance, which makes litigation so fascinating a game to the bar and so distressing to the litigants in many of the United States, is reduced to a minimum.

The Jury

Under the Ontario system[12] the right to trial by jury in civil cases exists only in certain cases in tort, and practically all other issues of fact are tried and all damages assessed by a judge without a jury.[13] If a party desires a jury trial notice must be given, but notwithstanding such notice the presiding judge may dispense with the jury.[14] The court may direct the jury to give a special instead of a general verdict,[15] and in all actions whatsoever, except in an action for libel, the judge may direct the jury merely to answer questions of fact put to them by him and not to give any verdict at

[9] Rule 327, etc.

[10] Paper of J. H. Spencer read at meeting of Ontario Bar Association in 1908, and Report of the Committee on Law Reform at same meeting. 45 *Can. L. J.*, 19, 23.

[11] Rules 348–352.

[12] Judicature act, sec. 53.

[13] *Ibid*, sec. 55.

[14] *Ibid.*, sec. 56.

[15] *Ibid.*, sec. 60.

all.[16] This method of substituting answers to specific questions for a verdict is used in nearly all cases. "The court may obtain the assistance of merchants, engineers, accountants, actuaries or scientific persons in such way as it thinks fit to enable it to determine any matter of fact in question in any cause or proceeding and may act on the certificate of such persons."[17]

It will be seen from these provisions that a profound change has taken place in Ontario in trial by jury. This ancient system which contributed so much to the development of the English constitution and to the maintenance of the liberties of the people no longer satisfies the demands of justice. Blackstone foresaw this,[18] and the French Canadians at the time of the introduction of English law could not understand how Englishmen would sooner have their property rights determined by the jury of tailors and shoemakers than by judges.[19] The American states are hampered in the establishment of jury reform by the provisions of the seventh amendment to the federal constitution.

Judicial Opinion in Legislative Matters

Although strictly speaking this subject is not relevant under the general caption of this article, I cannot refrain from making mention of a method in vogue in Ontario whereby much bad legislation is nipped in the bud. The practice is to refer all private acts to two judges for an opinion upon their justice and expediency,[20] and furthermore[21] the lieutenant-governor in council, i.e., the government, may refer to the court for hearing or consideration any matter which he thinks proper to refer for an opinion as in an ordinary action. If the constitutional validity of an act of the legislature is involved the attorney-general must have notice and the court may direct any party in interest to be notified of the hearing or may request some counsel to represent such interest. After hearing the

[16] *Ibid.*, sec. 61.

[17] Rule 268.

[18] 3 *Black. Com.*, 381.

[19] *Practice, Civil and Criminal in Ontario*, by the Hon. William Renwick Riddell, an address delivered before the annual meeting of the New York State Bar Association, January 20, 1912, p. 10.

[20] R. S. O. 1897, cap. 52.

[21] *Ibid.*, cap. 84.

court files an opinion which becomes a judgment subject to an appeal as in an ordinary action. This system has not yet been expanded to its full possibilities in Ontario, and is, I believe, practically unknown in the United States. As a method for eliminating much improper legislation it deserves most serious consideration. Such a method would impose additional duties on the judges, but granting the desirability of having a judicial opinion upon legislation either prior to its enactment or before any actual case arises under it, it might be advantageously adopted and expanded. It is in line with the general modern tendency to rely in technical matters on the opinion of experts, and there is much to be said in favor of introducing the expert into the field of law-making instead of limiting his function to the field of interpretation only after an actual controversy has arisen, in which the legislative act in question is invoked and must be applied.

The comparison between the Ontario and American practice, briefly and superficially herein presented, points out several lines of rational reform which it would be well for our statesmen and legislators to consider in their attempts to bring judicial procedure into alinement with modern needs and tendencies.

LEGAL PROCEDURE IN ENGLAND

By John L. Griffiths,

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In reviewing the administration of justice in any country, the most important thing to consider perhaps is the character of the judiciary. This is especially true of England, where the judges take a far more active part than they do in America in the trial of causes, and where they are far more outspoken in their comments on the evidence. The contrast between the manner of choosing judges in the two countries is very striking. The judges in England are appointed to serve during good behavior; they are paid adequate salaries, and upon retirement are provided with substantial pensions. The lord high chancellor receives an annual compensation of £10,000; the lord chief justice £8,000; the members of the high court of justice £5,000; the county court judges £1,500; and the magistrates of the Metropolitan (London) police courts as a rule £1,500. Justices of the peace serve without pay; they deal with minor cases, usually of a criminal nature, although they have a limited civil jurisdiction. In criminal prosecutions, where a grave offense is charged, and the justices are convinced of the probable guilt of the accused, it is their duty to bind him over for trial at the assizes. Political considerations, broadly speaking, have no weight in English judicial appointments, although in the case of men of equal merit the party in power would naturally be inclined to appoint a judge of its own political faith. An exception to the general rule is to be found in the case of the lord high chancellor, who retires from office with his party. His duties, however, are not purely judicial, as he presides over the deliberations of the House of Lords. It may be taken for granted when an English barrister becomes a high court judge that he previously held a prominent position at the bar, and had shown his probable fitness for the bench.

A foreigner who studies the English judicial system is very strongly impressed with the few courts in England in comparison with the great number in America. In Liverpool, for example—a city with a population of about 750,000—all the important cases

are tried at the assizes, which are held four times during the year. The sessions usually last from two to four weeks, and three judges are ordinarily in attendance. The judges upon circuit—and this is true generally—try civil and criminal cases indifferently. If the criminal docket is large at a particular assize, one judge will probably be designated to try the criminal causes. At the next assize he might sit only in the trial of civil actions. Under such an arrangement, a judge is less apt to have predispositions and prejudices than if his whole time were devoted to the hearing of a special class of causes. Listening from day to day to nothing but recitals of crime may often so harden the sympathies of a judge, and so blunt his power of discrimination, that he may impose sentences of undue severity, or look upon all who come before him as guilty, notwithstanding the presumption of innocence in their favor. He loses the quality of open-mindedness, and ceases therefore to be impartial in his judgments.

English judges, by reason of their life tenure of office, are not affected by fluctuations of public opinion. They realize they have but one duty to perform, and that is to administer the law as they understand it without regard to consequences. They resemble very closely, except in the adequacy of their compensation and the significance of their pensions, the federal judges in America. They control, or influence, or direct—whichever word may seem the most appropriate—the verdict of a jury to a far greater extent than do the judges of the state courts in America. A lawyer can experience no greater pleasure than to listen to the summing-up by an English judge of an important case. He calls the attention of the jurors to discrepancies in the testimony, emphasizes the importance of certain facts, endeavors to sift what is essential from what is immaterial, asks without passion or prejudice if a certain line of conduct is consistent with the contention of counsel, and after a full statement of the law reminds the jury that they are the sole judges of the facts, but that they must accept the law as delivered from the bench.

A distinguishing feature of legal procedure in England is the decision of a case upon its substantial merits, with a complete disregard of technicalities. In a criminal trial, for illustration, the important thing in England is to prove the commission of the offense rather than the precise manner of its perpetration. After the nisi

prius court has rendered judgment in a civil action, and either party feels aggrieved, an appeal may be taken. This is done without filing a motion for a new trial, and neither is a bill of exceptions nor printed briefs submitted. The appellate judges almost invariably decide a case immediately after the arguments have been heard. They have the power to modify the judgment by increasing or reducing the amount of the damages assessed. They may amend the pleadings, hear additional evidence, and make any order which in their opinion should have been made in the court below. They have the right to grant what may be called a partial new trial, covering only such question or questions concerning which it is thought there was a miscarriage of justice at the original trial, but without in anywise affecting the decision of the nisi prius court on any other question. Only about 10 per cent of the cases which are appealed against are reversed and sent back for further hearing. It will thus be seen that everything connected with the administration of justice in England has in view the expeditious trial and disposal of cases, so that litigants may not be worn out by protracted delays. Postponements are seldom if ever granted simply to meet the convenience of counsel, and ordinarily a case is tried, approximately at least, upon the date set for hearing. If a postponement is requested the costs—and they are usually substantial—must be defrayed by the party making the application.

A statute passed in 1851 (14 and 15, Vict. c. 100) indicates how thoroughly legal procedure has been simplified in the trial of criminal cases. The statute provides:

> From and after the coming of this act into operation, whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town, corporate, parish, township, or place mentioned or described in any such indictment; or in the name or description of any person or persons or body politic or corporate therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offense charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offense; or in the christian name or surname or both christian name and surname, or other description whatsoever of any person or persons whomsoever therein named or described; or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or

described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defense on such merits, to order such indictment to be amended according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred.

No indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record" or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or vice versa, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of by his proper name, nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury, or spoil is not of the essence of the offense.

Every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person; and thereupon the trial shall proceed as if no such defect had appeared.

It was only as recently as 1907 that a court of criminal appeal was created in England. Prior to that time, all criminal appeals were passed upon by the home secretary. The criminal appellate court is composed of the lord chief justice and eight judges of the king's bench division of the high court, appointed for the purpose by the lord chief justice, with the consent of the lord chancellor. Three judges, however, constitute, a quorum, and this is the number

usually sitting. The judgment of the majority prevails. The decision of this court is final, except where "upon the suggestion of the director of public prosecutions or the prosecutor or the defendant the attorney general certifies that the decision of the court of criminal appeal involves a point of exceptional public importance and it is desirable for the public interest that a further appeal should be brought." In such a case an appeal may be made to the House of Lords. If an appeal is taken in a criminal case, the court may either increase or diminish the sentence which has been imposed. The court has also the power "where an applicant has been convicted of an offense, and the jury could on the indictment have found him guilty of some other offense, and on the finding of the jury it appears to the court of criminal appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity." The fact that the criminal court of appeal may increase the sentence acts naturally as a deterrent in many instances, and tends to restrict the appeals to cases where counsel are satisfied that there is substantial merit in their position. Upon the appeal, witnesses may be called and examined who appeared in the nisi prius court, and witnesses may also be examined who could have been required to testify in the first instance but did not do so, and, further than this, competent witnesses may be heard, including the defendant himself, who could not have been required to testify upon the original trial. The court upon deciding against the appellant may order that the sentence shall run from the time of the appeal instead of from the date of conviction. The criminal appellate court has, however, no authority to grant a new trial, and, if it is satisfied that the appeal is well laid must quash the conviction and allow the defendant to go free. There has been much criticism of the inability of the appellate court to grant a new trial, and the lord chief justice and many other justices have declared that the power to do so should be vested in the appellate court. Judgment is rendered usually at the conclusion of the hearing of the appeal, but if there is an important point of law to be considered, the court may reserve its opinion for a few days and then deliver it in writing.

The rapidity with which cases are tried in England has attracted the attention and elicited the admiration of other countries. In a table which appears in a report of the special committee of the American Institute of Criminal Law and Criminology appointed to investigate the criminal procedure in England, it is shown, with reference to twelve cases heard at the central criminal court, London, that the ordinary time of trial—and this would include the impanelling of the jury, the statements of counsel, the examination of witnesses, the charge of the judge, and the verdict of the jury—was about two and one-half hours. These cases covered charges of murder, rape, arson, receiving stolen goods, and shooting with intent to murder. A verdict of guilty was returned in seven cases, a verdict of not guilty in two, and a verdict of guilty but insane in three cases. In four other cases referred to in the report, three required two days to try, and one—a case of criminal libel—eight days. It is interesting to note in these cases the time that elapsed between the date of the arrest and the date of trial, which was as follows:

Arrest	Date of Trial
May 4	June 3
May 16	June 4
May 7	June 6
April 27	June 7
May 9	June 10
May 2	June 10
April 18	June 4
May 3	June 4
May 27	June 29
June 1	June 29
June 4	July 1
July 8	July 19
July 5	July 10
July 16	July 19
June 27	July 20
March 4	June 8

The last mentioned case was the one in which criminal libel was charged.

The public prosecutor in England strives simply to discover the truth. He will in this quest even bring out facts favorable to the defendant if they are within his knowledge. His reputation at the bar fortunately does not depend upon the number of convictions he may be able to secure. No time is practically consumed in England

in the examination of jurors, as the ordinary practice is for counsel to discuss their objections with each other before the trial. If an objection has substance, it is almost always recognized in the interchange of views, and the name of the person is struck from the panel. The jury in a criminal case simply pass upon the question of guilt or innocence. If a verdict of guilty is returned, the sentence is imposed by the judge after he has been informed by a police officer of the history of the accused, and especially of any previous convictions. The trial of cases is greatly facilitated in England by the fact that few objections are made to the admission of testimony, and when made they are stated with the greatest possible brevity. The judge indeed usually passes upon an objection without hearing from counsel. If a barrister is inclined to be rhetorical, or to wander away from a discussion of the facts of the case, the judge will probably bring him down to earth by informing him that if he has nothing further to say it would be desirable for him to conclude his remarks. The impassioned appeal is seldom heard in an English court, even in the trial of criminal cases. It would have little influence upon the English juror, and would be very apt indeed to prejudice and alienate him.

It is not an exaggeration, I think, to say that cases are tried in England in less time ordinarily than it takes in America to impanel a jury. English newspapers are not permitted to comment upon the evidence during the progress of a trial, or even in advance of the hearing to do more than mention the bare circumstances of the commission of the crime. An atmosphere is not created, therefore, before the trial, either favorable or prejudicial to the plaintiff or the defendant in a civil action, or to the Crown or the accused in a criminal case, and a person who is called to serve upon a jury cannot have formed an opinion of the merits of the case from the perusal of his favorite newspaper. England, with a population according to the last census of over 30,000,000, has only eighteen high court judges. While there is a periodical demand for the creation of more judges, I am satisfied that in no country are cases tried with greater despatch than in England, and that nowhere are the demands of justice more adequately and admirably fulfilled.

In order that legal procedure in America may more closely correspond with that of England, the judges must be appointed to serve during good behavior, or if elected chosen for very long terms;

largely increased salaries must be paid; they must be freed from all political influences; in criminal as well as in civil cases, they alone should interpret and declare the law, and juries should not be permitted to substitute their own interpretation; newspapers must be restricted to a brief recital of the facts connected with the commission of an alleged offense; technicalities must be brushed aside in the trial of a cause, and no case should be reversed unless the appellate court is satisfied that substantial injustice has been done; postponements should only be grudgingly granted, and never merely to suit the convenience or comfort of counsel; arguments of counsel should be limited as to time, and during that time they should be compelled by the judge to confine their remarks to an unemotional and unrhetorical discussion of the facts of the case.

APPENDIX

CAUSES FOR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE IN METROPOLITAN DISTRICTS[1]

INTRODUCTORY

I. The causes for dissatisfaction with the administration of justice are more numerous and more emphatically apparent in a metropolitan district than anywhere else.

II. The causes group themselves about the following six subjects:

A. Selection, retirement and discipline of judges.

B. Organization of the judges after they are selected.

C. Selection of jurors as judges of the facts, the guidance of the jury and discrimination in its use.

D. Rules of practice and procedure.

E. Efficiency in the offices of clerks of courts.

F. Selection, retirement, discipline and organization of the bar.

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[1] This statement was prepared by the American Judicature Society and sent out accompanied by the following letter:

AMERICAN JUDICATURE SOCIETY

TO PROMOTE THE EFFICIENT ADMINISTRATION OF JUSTICE

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DIRECTOR OF DRAFTING
WILLIAM E. HIGGINS, Chicago

January 6, 1914.

DEAR SIR:

We herewith send you an analytical outline of causes for dissatisfaction with the administration of justice in a metropolitan district, excluding, however, the special causes for dissatisfaction with particular rules of practice and procedure.

This outline was prepared at the instance of the Directors of this Society. It does not necessarily represent the views of the Directors. It simply brings

I. SELECTION, RETIREMENT AND DISCIPLINE OF JUDGES

I. It has been suggested that in the metropolitan district where the elective system prevails the following is a fair *description of the actual mode of selecting and retiring judges and the weaknesses of that system.*

A. Judges are usually not really elected, but are designated by the leaders of the party political machine dominant in the district. These leaders appoint the nomination. The electorate only decides which of two or three sets of nominees it prefers. The compulsory primary has but little altered the situation.

B. These leaders have too little responsibility for the due administration of justice. They have the strongest motives for rewarding purely political service to an organization. The occasional instances when the political leaders exercise power to good purpose do not alter the fact that the system is lacking in adequate efficient responsibility.

C. The judges are subject not merely to a recall, but to a progressive series of recalls—*first*, by the leaders of the party organization refusing nomination; *second*, by a wing of the party knifing the candidate at the polls; *third*, by an upheaval in a national election; and *fourth*, and most rarely, by actual public dissatisfaction with the judge himself. These recalls for the most part retire the judge from office regardless of the character of his service. The

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together in concise form many, and we hope, most of the suggestions which have been put forward in the last few years by different persons regarding the causes for dissatisfaction with the administration of justice in the United States (omitting, however, particular proposals regarding practice and procedure).

We desire to promote an expression of views on your part regarding the items of this analysis and to receive any independent and additional suggestions which you can give us. If your experience has not been in practice in a metropolitan district, your views as to how far the suggested causes for dissatisfaction apply outside of such districts will be much appreciated.

In replying please refer to the page and subhead of the enclosed analysis and address your remarks as specifically as possible to each item. At the end add further suggestions not brought out by the comments already given.

It is our plan to classify and arrange all the answers received under each item of the enclosed analysis and to add the many additional suggestions which will be received and in this way secure a complete compilation of all suggested causes for dissatisfaction with the administration of justice.

Please do not attempt at the present time to go into your views concerning the details of practice and procedure, for we shall send out at a later time an analysis regarding the causes for dissatisfaction with the rules of practice and procedure and invite your views especially upon that subject by itself.

Very truly yours,

AMERICAN JUDICATURE SOCIETY.

HERBERT HARLEY,

Secretary.

recall at any time by petition will operate to place the judges even more in the power of the political party machine organization than they are now.

D. There is at present no means of disciplining judges at all.[2] There is no chief justice or presiding justices of different divisions of the court to whom the rank and file of judges are responsible for the performance of their duties.

E. There are no service test requirements which permit judges to be selected from among those practitioners only who have obtained some success in actual practice before courts.

F. The mode of selecting and retiring judges is so unsatisfactory and the character of the duties of judges is such as to stifle competition for places on the bench by men who have succeeded in practice.

II. It has been suggested that the selection of judges in the sense of the picking out by the electorate of those among the lawyers who it desires above all others is impossible for a metropolitan district having over one hundred thousand population; that such an apparent method of selection results in appointment by the political party leaders; that therefore if by a non-partisan ballot the political party machine influence could be eliminated or so greatly reduced as not to be controlling, nothing but chaos would result: that as a matter of fact the great influence of the political party machine would continue to be the predominant principal force in the election of judges even with the non-partisan ballot.

III. It has been suggested that the bar association should be given power to place upon the official ballot a bar association ticket which could have upon it candidates who had been nominated by any of the other political parties. The question, however, has arisen whether this would result in a greater power in an unbiased bar association to select good judges, or in the lining up of lawyers in political camps controlled by the leaders of the political party machines.

IV. It has been suggested that nothing of great value can be accomplished until the fact is faced that judges in a metropolitan district are practically certain to be appointed and that the only proper appointing power is one which is legal, conspicuous, subject directly to the electorate and interested in and responsible for the due administration of justice; that this principle may be worked out in various ways:

A. Suggested that judges may be appointed by the state executive; that this is better than the present mode, but objectionable because of the governor's interest in promoting a legislative program, the building up of a political machine, and his remote responsibility for the administration of justice; also that he is frequently a stranger to the metropolitan district.

B. Suggested that appointment be by the highest appellate tribunal of the state, the members of which are subject to the electorate; that this is better than the present method and better than appointment by the governor, because such a court is more responsible than the executive for the due admin-

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[2] Except in the municipal court of Chicago and a few others similarly organized.

istration of justice and the members of it have a stronger motive for appointing fit men, as well as an excellent opportunity for determining the character and ability of lawyers. On the other hand, most of them may be strangers to the metropolitan district. Also there is danger that the most important tribunal of the state may become involved in politics. Furthermore, responsibility for selection is not concentrated.

C. It has been suggested that the appointment be by a chief justice who is a resident of the metropolitan district and who is subject to the electorate at fairly frequent intervals and in whom should be vested large powers to oversee and direct the work of the courts. It has been suggested that such a chief justice would be conspicuous and in a high degree responsible for the due administration of justice and therefore most interested in the selection of fit men for judges.

1. If such a plan be adopted the following questions arise concerning the selection of the chief justice:

(a) Shall he be elected at a general November election, or a general city election in the spring, or at a special judicial election in June, when no other offices are filled?

(b) Shall there be a separate judicial ballot?

(c) Shall the ballot be partisan or non-partisan?

(d) If partisan—

(1) Shall nominations be by primary?

(2) May candidates run on as many party tickets as choose to include them?

(3) Shall there be a special bar association ticket which may include upon it candidates running on other tickets?

(e) If non-partisan—

(1) Shall nominations be by petition? or

(2) Shall anyone eligible be free to run upon making a deposit in money which will be returned to him if he receives at least half as many votes as any person elected to office?

(f) It has been suggested that the eligibility test for the chief justice should be—

(1) That he has been a lawyer in active practice in the handling of litigation in courts of the state for fifteen years; that he should have been also a resident of the metropolitan district and a practitioner at the bar of that district for not less than ten years.

(2) If any organization of the bar is effected which gives special recognition to practitioners who specialise in the handling of litigation in the courts, the chief justice should be selected from this class only.

(3) That judges already sitting be eligible to run for chief justice only upon resigning at least thirty days prior to the election.

2. Under the plan of selection by the chief justice of the other judges of the court several questions arise:

(a) Shall some of the judges be appointed by the chief justice with the consent of the governor or any other body while other judges are appointed by the chief justice alone?

(b) Shall the eligibility test permit any citizen of the United States who has been admitted to the bar for a given number of years and practiced in any state to become a judge?

(c) Should an eligible list be created consisting of twice as many members as there are judges of the court, to be selected by the chief justice of the court and the heads of the different divisions of the court, to the end that the chief justice may be required to select at least every other judge appointed from the eligible list?

3. The question also arises as to the proper mode of selecting masters or assistant judges:

(a) Shall they be appointed by the chief justice alone; or

(b) By the chief justice and the presiding justice of any division of the court to which the master is to be attached, and in case of disagreement, the presiding justice of the appellate division to make a third member of the selecting committee; or

(c) Shall appointment be by the chief justice and the presiding justice of the division to which the master is attached in rotation; or

(d) Shall the appointment be by the presiding justice of the division to which the master is attached?

(e) Shall there be a civil service examination providing an eligible list and testing candidates' knowledge with respect to the duties of the office and their experience?

(f) Shall any citizen of the United States admitted to the bar in any state be eligible?

V. It has been suggested that the retirement of judges is an entirely different problem from that of their selection; that the problem of retirement also differs, according as the judge is a chief justice with power to appoint judges, or is merely one of a number of judges who have been appointed or otherwise selected.

A. Retirement of the chief justice.

1. What shall be the limit of his term?

2. Shall he be subject to impeachment; or

3. Recall by joint resolution of the legislature; or

4. Recall by popular vote which at the same time operates to elect another?

5. In case of retirement by failure to be reëlected shall the chief justice continue to remain one of the judges of the court, subject to assignment to duty by his successor?

B. Retirement of judges other than the chief justice.

1. Shall they be retired by impeachment; or

2. Recalled by joint resolution of the legislature; or

3. Recalled at any time by popular vote which merely vacates the office, leaving it to the chief justice to fill the place by appointment; or

4. Shall the name of the judge be submitted to the electorate at specified periods, such as three, six and nine years; the question being whether the judge's place shall be vacated, leaving it to be filled by the appointment of the chief justice; or

5. Shall the judge be removable by a vote of the judicial council consisting of the chief justice and the presiding justices of the different divisions of the court after a hearing and after cause shown, the cause to be as general as under civil service acts, *namely*, inefficiency, incompetency, neglect of duty, lack of judicial temperament and conduct unbecoming a judge?

C. Retirement of masters.

1. They may hold at the will and pleasure of the appointing power; or

2. The will and pleasure of the judicial council; or be

3. Dischargeable only for cause which must be stated in writing but need not be proved, said discharge to be by the head of the division to which the master is regularly attached, with the consent of the chief justice; or

4. Discharge only for cause and upon a hearing before the judicial council.

VI. Suggested that the discipline of judges is a different matter from their retirement.

A. That an elective chief justice with power to appoint judges to the court should not be subject to any disciplinary authority on the part of the court.

B. As to the judges other than the chief justice who are appointed to places by the chief justice, it has been suggested:

1. That the council of judges composed of the chief justice and the presiding justices of the several divisions of the court should have power to reprove any judge privately or publicly, to transfer any judge to some other division of the court upon a hearing and for cause shown, such as inefficiency, incompetency, neglect of duty, lack of judicial temperament and conduct unbecoming a judge.

2. That judges, especially in the trial courts, would be held in check and to a proper line of judicial conduct if there were present in the court a specialized and expert bar and by the constant reporting of selected rulings by members of the bar.

C. No special provision for disciplining masters is needed because of the manner in which they may be removed.

VII. It has been suggested that competition for places on the bench by successful practitioners would not be promoted by raising salaries so much as by

A. An improved mode of selection and retirement of judges which tends to give security of tenure to those who do satisfactory work;

B. The improvement in the personnel of the bench and its better organization for the purposes of efficiency, as hereinafter suggested, so as to furnish proper fields of specialization for judges.

C. The creation of important administrative positions, such as the presiding justices of the divisions, who should be *ex officio* judges of the appellate division. This would also attract men of special ability at the bar who might be disinclined to take an ordinary judicial position.

D. These features need only be added to the present salary arrangement in many places to make the positions on the bench sufficiently attractive to draw able and successful members of the bar.

II. THE ORGANIZATION OF JUDGES AFTER THEY ARE SELECTED

I. It has been suggested that the problem presented by the court of general jurisdiction in a metropolitan district where many judges are working at the same time over extensive dockets of cases of all sorts, is this: How can each judge in the time spent upon the bench be brought most effectively into contact with litigation? How can his energies be applied so that he wastes the least time and does the most accurate thinking, which leads to a determination of the cause? This is an ordinary problem for an efficiency expert.

II. It has been suggested that an efficiency expert would first classify and arrange the work.

A. That he would find that all of it fell into at least four classes:

1. Non-contested matters—defaults, motions of course, amendments, etc.
2. Contested motions, demurrers, etc.
3. The trial on the merits.
4. Appeals.

III. It has been suggested that the efficiency expert would then stop the spending of time by the judge on the more trivial work which others could do as well; that he would utilize the services of less highly paid masters or assistant judges to handle motions of course, ordinary defaults and uncontested matters.

IV. It has been suggested that the efficiency expert would then take care that individual judges did not have to cover too wide a field in the handling of causes.

A. That he would find that no man could become expert when he must cover all kinds of practice and substantive law, such as criminal pleading, practice, trials and substantive law; common law pleading, practice, trials and substantive law; chancery pleading, practice, hearings and substantive law; appellate practice and substantive law and practice in all sorts of cases appealed.

B. That the efficiency expert would find that there are several extensive fields of substantive law and of practice in which judges could specialize profitably to themselves, to the public and without unduly restricting the scope of their work, such as

1. Civil and criminal jury trials.
2. Commercial cases tried with and without a jury.
3. Cases tried without a jury, covering the field now largely covered by what is known as chancery practice.
4. Probate, divorce, juvenile court, and family relations in general.

C. That the obvious step is for each judge to be assigned to final hearings in one of these classes of cases—a sufficient number of judges being assigned to each class to dispose of it.

V. It has been suggested that it is obviously unwise to let six or fifteen or thirty judges go to work as they please on a long unspecialized docket of several thousand cases; that to obtain the best results there must be divisional heads who will have large administrative powers and responsibility for

the docket of each division. Hence, each division should have a presiding justice.

VI. It has been suggested that all these arrangements should be merely tentative; that actual experience may show that it will be advisable to transfer some classes of cases from the docket of one division to that of another and some judge from one division to another, and to make new rules for the conduct of judicial business and the function of masters. Hence there must be some managing authority at the head of the whole organization. The chief justice of the entire court is therefore necessary. He should be the head of an executive committee composed of the heads of the several divisions, with full powers of management. The same powers should reside in the court as a whole, if it chooses to exercise them.

VII. That an important cause for dissatisfaction is the attitude of appellate tribunals toward the trial courts, the former frequently administering corrections to the trial judge through reversals. It attempts to discipline and educate by the same means. The result is the trial judge and the appellate tribunal become estranged and in their bickerings the litigant and the public suffer. The remedy for this is obtained by the organization above suggested, where the appellate tribunal and the trial courts are subject to the same central authority, namely, the chief justice and council of judges. By this means trial judges may be corrected and disciplined in a suitable way and by proper authority if they be at fault, without the litigant suffering. The appellate division on the other hand, may be compelled by the same authority to attend solely to the administration of justice and to refrain from exercising the function of educating and disciplining trial judges.

III. SELECTION OF THE JURY AS JUDGES OF THE FACTS, AND ITS GUIDANCE. DISCRIMINATION IN THE USE OF THE JURY

I. Jurors, when used, are the judges of the facts in controversy. The public service of administering justice consists in part of their mental operations in determining facts. Property and personal rights are subject to the determination of jurors. The subject of the method of their selection, the choice of causes in which their services are used and the guidance of the jury by the court is of great importance. Defects in any of the three respects mentioned may give rise to serious dissatisfaction with the administration of justice.

II. Methods of selecting jurors. This has several stages.

A. The drawing of panels by jury commissioners.

B. The preliminary examination by the judge and excusing men or finding them disqualified. Where this is performed by the judge for every panel, it is a waste of time and energy and he should be relieved of it and the duties placed upon some less important official acting under the direction of the judge or the presiding justice of division.

C. The examination of jurors when called into the box and sworn to answer questions touching their qualifications. Here is presented the problem of shortening up the examination, preventing abuses in the extent of exami-

nation, which may result in great waste of judicial energy. *Quaere:* Whether the extensive examinations permitted do not in part find their justification in the fact that in many states under the present system the jurors obtain no guidance from the court in the performance of their function as judges of the facts.

III. It has been suggested that to meet the case of the absence of a member of the panel in long cases there should be additional jurors, or the taking of a verdict of less than the total number.

IV. It has been suggested that the verdict of less than the entire number of jurors hearing the case be sufficient.

V. Discriminating in the use of jurors:

A. It has been suggested that in some classes of cases jurors are of no value at all, *viz.*, in suits depending upon the construction of documents or the legal rights arising from documents. Their use in this class of cases is now eliminated in chancery causes.

B. It has been suggested that juries are of value where the result depends upon the evidence of witnesses regarding human actions and conduct. In these cases juries are a protection against a one-man view of the evidence. A chance is provided for debate among several minds looking at the evidence and observing the witnesses. A chance is given for an appeal from the experienced judge to the judgment of twelve less specially trained minds.

C. At present the cases where juries are not used and where they are used is to some extent illogical, depending upon historical considerations of whether the cause was originally in chancery or at law. It has been suggested that the matter should be reduced by rules of court or by legislation to a more rational line of distinction between the cases where juries are of special service and where they are of no service. In cases lying between the two extremes juries might be permitted upon application and upon terms.

D. It has been suggested that less than twelve jurors be used, especially in cases involving small amounts.

VI. Expert guidance of the jury by the courts: It has been suggested that as the jury with its numbers is a safeguard against the judge, so the judge with his experience should be a safeguard against the jury; that the two should be responsible together for securing a correct view of the facts. The judge, therefore, should have freedom to give to the jury not only his views of the law, but also in his discretion his analysis of the evidence.

IV. THE RULES OF PRACTICE AND PROCEDURE

I. It is suggested that there can be no solution of the problem of efficient rules of practice and procedure so long as the rules which are promulgated are made by the legislature and put out in the rigid and unchangeable form of statutes, which can only be altered or amended or repealed by further act of the legislature; that the subject-matter of rules of procedure and practice has to do with the details incident to the rendering of a public service. The matters dealt with are too minute and technical to secure adequate attention from the legislature. Legislative enactments on such details, however satis-

factory to start with, are certain in the course of time and with changing conditions, to fail.

II. It is suggested therefore that the first and most important step in the improvement of practice and procedure is for the legislature to place the rule-making power in the hands of the courts, with authority to make readjustments from time to time.

V. THE METHOD OF SELECTING, RETIRING AND DISCIPLINING OFFICERS OF THE COURTS, THE CLERKS AND THEIR ORGANIZATION AND DUTIES

I. Here the chief causes of inefficiency are to be found in the multiplication of clerks for different courts instead of a central clerk's office; the complete isolation and independence of the separate clerks by reason of the fact that they are elected and subject only to statutory duties and beyond the power of control by the judges.

II. It is suggested also that the fact that they are elected simply hands the filling of these offices over to the political party leaders who for the time being are successful; that this is in fact an appointment and not an election; that an election in the sense of the electorate choosing is out of the question in a metropolitan district because of the inconspicuousness of the office and that, therefore, some method of appointment is inevitable.

III. It is suggested that a much better method of appointment would exist if the chief justice or a judicial council of the court were authorized to appoint one clerk for one central clerk's office, to hold at the pleasure of the appointing power.

VI. METHODS OF SELECTING, RETIRING AND DISCIPLINING MEMBERS OF THE BAR AND THEIR ORGANIZATION

I. As to the *selection*, *retirement* and *discipline* of members of the bar.

A. As to the methods of selecting lawyers much has been done to raise standards, moral and educational, for admission to the bar. It has been suggested, however, that further steps may be taken, *viz.:*

1. That two years of general collegiate education be required.

2. That a law school education be required, the period to be the usual one of three years.

3. That admission upon examination at the end of three years' law school study permit practice, excluding, however, any right of being heard in the courts in contested matters; that to acquire the right of being heard in such contested matters in each division of a metropolitan court, a period of apprenticeship in practice be required and a further and special examination, oral and written, which would relate to the practice and rules of substantive law handled in the particular division to which admission is desired.

4. It is suggested also that the whole matter of enforcing compliance with rules for admission to the bar be placed in the control of the governing board of a legally incorporated society of all the lawyers (as indicated hereafter under II) which governing board should act under the supervision of the highest appellate tribunal of the state.

B. It has been suggested that our present method of retiring lawyers by disbarment is so cumbersome as to be quite inadequate in a metropolitan district having from five hundred to five thousand lawyers.

1. It has been pointed out that disbarment proceedings are brought in the highest appellate court of the state, where the matter is referred to a referee for the taking of testimony in support of the charges, the referee reporting his conclusions upon the issues. Thereafter there is a trial *de novo* before the full bench of the supreme court on the entire evidence as reduced to writing. Such disbarment proceedings are in fact a great burden upon the highest appellate tribunal and take up the valuable time of the most important judicial body of the state over what can be as well done by the governing board of a properly organized bar.

2. As a practical matter the grounds of disbarment are the commission of crimes or very serious offenses involving the breach of fiduciary obligations and in rare cases, gross fraud and deception of the court. Some courts have even doubted their power to impose lesser penalties, such as suspension from practice for a limited length of time.

3. It has been suggested that to remedy the above conditions the grounds for disbarment should be codified as completely as possible by the supreme court, or under its direction, and that the enforcement of the code be conferred upon the governing board of a legally incorporated society of all the lawyers in the metropolitan district, subject only to a review by the courts upon terms fixed by rules promulgated by the highest appellate tribunal.

C. It has been pointed out that for the lesser and more prevalent sorts of unprofessional conduct no authoritative code of conduct for lawyers exists except that contained in the grounds for disbarment. The highest tribunal of the state might issue such a code and provide for its enforcement, but it has not done so. Hence no means now exists for requiring a high standard of conduct from lawyers.

1. It has been suggested, therefore, that the supreme court prepare, or have prepared under its direction, an authoritative code of conduct for lawyers.

2. That the enforcement of such a code should be placed in the governing board of an incorporated society of lawyers with possibly a review within limits by the courts, as provided by the rules of the supreme court.

3. That for the infraction of the rules of the code of conduct the governing board of the legally incorporated society of lawyers be permitted to punish by the giving of private warnings, public warnings, public resolutions of condemnation and suspension from practice for a limited period.

II. As to the *organization of the bar*.

A. It has been pointed out that the present organization of lawyers is purely social and voluntary, including in many instances only a small part of the total number of lawyers. It has no such organization or powers as enable it to take charge of admissions to the bar or the matter of disbarment or the discipline of members of the bar and enforcement of an authoritative code of legal ethics.

B. It has been suggested that what is needed is a legally incorporated

society which shall include all lawyers by the simple process of fixing the fees to be paid and the requiring of every lawyer, as a condition to continuance in practice, to keep up his membership in the society; that the governing board of such society should be composed of representatives elected for a considerable term and that the governing board should have power conferred upon it to enforce the rules of the highest court of the state as to admissions to the bar; also to enforce any authoritative code of legal ethics and disbar members. The governing board might be given power to promulgate a code of legal ethics and to enforce it by suspension from practice for a limited term.

C. It has been suggested that the present bar associations are properly organized and well adapted for the functions which they now perform, *namely:*

1. Discussion of public questions such as selection of judges, the changes in procedure and substantive law.

2. Social activities.

III. As to the *specialization* of lawyers with respect to their professional activity.

A. It has been suggested that the same reasons which demand specialisation among the judges in the interest of efficiency, require it even more among lawyers. It has been urged that to permit lawyers in a metropolitan district to be heard in any court at will at the same time that they are carrying on all the possible lines of activity which the lawyer touches in the business of the commercial world or in the personal affairs of clients, is to introduce the same sort of disorder and inefficiency as would occur in any large department store if all the employees were allowed to serve the public in any way they saw fit.

B. It has been suggested that the fundamental line of cleavage in the activities of lawyers is between the counselor and the advocate.

1. The position of the counselor has been thus described: The counselor is the lawyer who has clients. Their affairs, business and personal, so far as they touch the law, and in many respects where they do not touch the law, are his principal care. His success is founded in his ability to keep his clients out of trouble; to adjust their differences; to see that the instruments they execute have no pitfalls for them and that their sales and purchases, their creation of trusteeships and organization of corporations, are accomplished within the law. It is the counselor's duty to play safe for his client at all times and to keep him out of difficulty. In a metropolitan district where great business interests center and the wealth of individuals and corporations is very great, the counselor's entire time and energy are frequently given to his special branch of the profession.

The counselor may be an individual lawyer with a small office and a very quiet line of counseling. Frequently several organize in a firm and specialise their counseling somewhat in different directions. Some firms are so large and have such an enormous business that a long list of partners is necessary, many of whose names do not appear in the name of the firm. Many clerks and assistants are employed and different branches of legal business are handled in different departments of the office. Some counselors devote themselves as individuals to special lines of counseling. They are counselors to trust de-

partments of a bank. They are counselors for corporation management and the issuance of corporations' securities or for particular kinds of corporations. Often their offices are with the executive offices of the corporation, or adjacent to the business office of the individual. Sometimes they are independent and serve several corporations or individuals requiring the same sort of counsel.

The counselor with any extensive practice in a metropolitan district has no time for work in the courts in important contested matters. The simpler and uncontested work in the courts is performed by clerks, assistants and junior partners under the counselor's direction. The counselor discovers that he loses money whenever he goes into court in a contested case. His clients cannot reach him and he cannot serve them satisfactorily. When the counselor's client becomes involved in important litigation it is economically to the advantage of the counselor to prepare the case fully in view of his complete knowledge of all the affairs of the client, and then to secure the services of a trained advocate who can fully absorb the case and does so under the guidance of the counselor, and then conducts the case through the courts, with or without the coöperation of the counselor, as the counselor prefers.

2. The advocate's line of activity has been thus described: The advocate answers the inevitable demand of the counselor for a well-trained and effective trial lawyer. The advocate makes a business of practicing in the courts in contested cases, especially those of more than usual importance to the parties engaged. His success depends upon the development of individual talent in the handling of litigation in the courts on the civil and criminal side, or both. He must satisfy, not the layman who is a client, but the trained counselor who is able to distinguish ability from bluff. The advocate, therefore, has no time for or interest in the miscellaneous affairs of clients. His energy is concentrated upon the handling of particular cases in the courts. Whatever counseling he may do is merely such as he may contribute at the request of counselors in particular matters where his advice, in view of his experience in the courts, may have particular value. The advocate's days are spent in the preparation of cases for hearing or in actual trials. His earnings accrue as the result of conducting litigation which the counselor decides is necessary or inevitable. Specialization among advocates is probably inevitable. Some will devote themselves to jury trials, civil and criminal, and appeals; others to commercial causes tried with and without a jury, and appeals; others to chancery causes and appeals.

3. It has been suggested that in view of the special development of the counselor in the United States his position must be the more prominent and important branch of the profession. Socially, financially and from the point of view of influence in the community, his is the more desirable position. The advocate is clearly dependent upon the counselor for business and consequently must seek the favor of the counselor. The advocate always stands in the community as an individual with individual talents. He gets nowhere professionally as the member of an organization. He renders always individual and personal service. The financial rewards on the average are comparatively small. He tends toward an interest in the academic side of the law rather than toward a development of commercial and financial astuteness.

The advocate, however, chooses his profession because he prefers the work which he selects to that which the counselor does and his own special reward is the attainment of success as an advocate and after a mature experience, a place upon the bench.

C. It has been suggested that a *sine qua non* to the development of the distinction between the counselor and the advocate is that the advocate shall not invade the sphere of activity of the counselor by dealing with clients and that the counselor in return shall not undertake the handling of contested matters in the courts except as he does so in coöperation with the advocate. The latter rule is a fair exchange for the former. The keeping of the advocate away from handling clients is absolutely necessary as a guarantee that a popular advocate who has a public following shall not steal the clients of the counselor.

D. The advantages of such specialization among lawyers have been put forward as follows:

1. These advantages are very great from the point of view of the individual. He has a chance for more agreeable work by reason of the specialization, and also in case of success, an opportunity for greater profits.

2. From the point of view of the public the advantages are:

(a) The specialization furnishes a service test for candidates for judgeships, since judges would for the most part be selected from those who specialize in the handling of contentious business in the courts.

(b) The motives for expediting the work of the courts by the lawyers are vastly increased.

(1) The lawyer handling contentious business in the courts wishes to go ahead with trials as rapidly as possible, since his income depends upon doing this work.

(2) The client wishes work in the courts done expeditiously because he is paying an expert for special services.

(c) Greater assistance is rendered the court. Court and advocate can drive at the main point of controversy with the greatest speed. The advocate can eliminate much that he knows by experience to be not worth presenting without fear of injuring the client's cause.

(d) False and fraudulent claims and ill-founded suits are more easily than now to be discouraged because the advocate must protect his standing with the court.

(e) Greater knowledge of the rules of the courts by the bar is developed and the criticism and scrutiny of the judge's work are much closer and hold the judge much more in check than the present system.

(f) There is better service to the client.

(1) Legal business better attended to.

(2) Litigation more quickly reached and disposed of.

(3) Better representation on the firing line in litigation.

(4) Better preparation for trial.

(g) Over-contentiousness would be reduced because the advocate must protect his standing with the court.

(h) The objection that a separation of the advocate from the counselor is a bad thing is founded largely in the sentiment and pride of present members of the profession, all of whom call themselves members of the bar, and have freedom to range the courts when and where they please. It is said also that a man who is in touch with the client's entire affairs prepares a case better for trial. But even when an advocate is employed the client's regular counselor has the chief burden of the case's preparation and there is no reason why the advocate should not have the greatest freedom of intercourse with the client and the witnesses in preparing cases for trial. No canons of professional etiquette should ever be allowed to keep the advocate from direct contact with the client and his witnesses, or separate the counselor from easy conference with the advocate while in court. As for the counselor's pride in having free audience in the court, that should not stand in the way of efficiency in the work of the courts and the service rendered clients.

E. It is suggested that such specialization among lawyers may be promoted in the following ways:

1. *The competitive method:* Under this the advocate makes it clear that the counselor cannot compete with him in the handling of litigation in the courts. This results in the following developments:

(a) Large firms of counselors, with a large and varied number of clients, employ one or more advocates to give all their time to the litigated work of the firm.

It has been suggested, however, that this is a transition stage only, because

(1) It does not provide any way for the smaller firms of counselors and single counselors to secure expert advocacy without running the risk of losing their clients to the big firms of counselors.

(2) It has the disadvantage of cutting off the large firm of counselors from securing the best advocate for the particular case. It requires the employment of the same advocates for all sorts of cases.

(3) This arrangement is unsatisfactory to the advocate in the long run, for he finds it continually more difficult to become expert when he must deal with the difficult cases arising in a metropolitan district handling many thousands of important cases in all branches of the substantive law and practice.

(b) The moment the system whereby an advocate gives all his time to a firm of counselors begins to break down the individual advocate appears. He first answers the demand of smaller firms and individual counselors who wish to secure expert advocacy in particular cases, and by restricting the field of his advocacy he is able to compete successfully in his line with the advocates employed by the big firms who must cover a very much wider field.

2. *The slightly coercive method:* This involves the imposition of special requirements for admission to practice in the courts in the handling of contested matters and trials, *viz.:*

(a) First, a general admission to practice as counselor.

(b) Practicing as a counselor for a limited term.

(c) Then a special examination for admission to practice as an advocate in each trial division of the metropolitan court.

(d) This might result in many persons staying out of practice in contentious matters, especially in courts where they never expected to practice. It would tend to cause one who had taken the trouble to secure admission to practice in particular divisions, to practice there and to receive a share of contested causes heard in those divisions.

(e) This plan leaves every lawyer free to practice both as a counselor and as an advocate, but imposes special requirements on practicing as an advocate which would tend to cause anyone so practicing and succeeding to devote himself largely to advocacy.

(f) It should be a rigid rule, even under this system, that any lawyer practicing as an advocate should be barred from ever or for a considerable time dealing as a counselor with any client whom he represented as an advocate for any counselor.

3. *Compulsory division:*

(a) The counselor might be ruled out of all audiences in the courts in contested causes except as he appeared associated with an advocate and the advocate might be ruled entirely out of the sphere of the counselor, and the requirements for admission to each branch of the profession might be fixed independently, with the right of any member of either branch of the profession to transfer to the other branch.

BOOK DEPARTMENT

NOTES

ATWOOD, E. L. *The Modern Warship.* Pp. 146. Price 40 cents. New York: G. P. Putnam's Sons, 1913.

BELLET, DANIEL. *La Nouvelle voie Maritime le Canal de Panama.* Pp. 330. Price, 5 fr. Paris: E Guilmoto, 1913.

It is fortunate that there is little probability that M. Bellet's opinions concerning the Panama Canal will find immediate and universal acceptance in the United States, else it is doubtful if the canal would be opened. According to him the waterway is merely a huge monument to a course of misconduct and a policy of folly. The United States government swindled the French canal companies, sandbagged Colombia, broke faith with England, and repudiated its obligations to the entire world, and withal has spent a tremendous sum of money on a work which will never pay the expenses of maintenance and operation let alone the cost of construction.

BRISSENDEN, PAUL F. *The Launching of the Industrial Workers of the World.* Pp. 82. Berkeley: University of California Press, 1913.

This interesting short study presents a mass of testimony on the beginnings of the Syndicalist movement in the United States. It reviews the preliminaries to the calling of the first convention of the Industrial Workers of the World in 1904–05. The various groups and elements represented at the convention in June, 1905, are carefully analyzed and tabulated. The bibliography, comprising almost one-fourth of the pamphlet, is complete and valuable. This list of magazines and newspapers of the present labor movement is particularly useful to the student while to the layman the existence of this amount of material will come as a distinct surprise.

BROWN, SAMUEL W. *Secularization of American Education.* Pp. 160. Price, $1.50. New York: Teachers College, Columbia University.

This is a Teachers College thesis and is a review of the state legislation, state constitutional provisions and state supreme court decisions by means of which the present secularization of education exists. It traces in a number of chapters the history of education in America from the day when the aim was almost entirely religious, through the stage when the aim and control were both religious and secular, to the present condition where state institutions are entirely secular both in fact and theory. In every state of the Union there exists now a system of public education in which civic and industrial aims are dominant, in which religious instruction is either entirely eliminated or else reduced to the barest and most formal elements, and the control of which is

invested well-nigh exclusively in the state. The author thinks that the two factors which have brought about the change are: an educated citizenship, necessary to the existence of a republic, and religious opinion which is an individual right. The book is a valuable reference to one interested in the evolution of a system of education and the controversy between church and state in their efforts to control and determine the same.

BURKE, E. J. *Political Economy*. Pp. xvi, 479. Price, $1.50. New York: American Book Company, 1913.

This book, written by a professor in a Catholic university, is designed for use in Catholic colleges, high schools, and academies. Though no particular effort has been made to introduce Catholic dogma or teaching, yet the special feature of the book is the presentation of the Catholic doctrine whenever the subjects treated touch upon the domain of ethics. Naturally, frequent reference is made to the encyclical *rerum novarum*.

The treatment of the elementary principles of economics is prefaced by an account of the various schools of political economy. Among the more important principles of the Catholic school are: The right of private property in the means of production; the right of private individual productive energy; toleration of the differences of classes in society, without the bitter opposition now existing between them; the rejection of the "Laissez-Faire" principle of the liberal school which errs in insisting almost exclusively on the rights of the individual; and the carrying on of strenuous warfare against the Socialist doctrine which would subvert the present order of society, and would, it is claimed, subject the laborer to even greater slavery than Socialists claim now to exist, since under Socialism laborers would be dependent for their labor and place of work upon the will of the community.

CANNON, IDA M. *Social Work in Hospitals*. Pp. xi, 257. Price, $1.50. New York: Survey Associates, Inc., 1913.

The author of this volume has had an unusual opportunity to know and understand the possibilities of social service work in connection with hospitals. She has long been the head worker of the social service department of the Massachusetts General Hospital in immediate association with Dr. Richard Cabot, the pioneer in this field. A year ago, Miss Cannon had the opportunity to visit a number of institutions and observe various methods of work. This book is designed to furnish not merely information about the movement, but definite instruction with reference to the handling of different types of problems that arise in connection with the hospital. Thus the three chapters on medical-social problems form the real backbone of the volume. There are also excellent chapters on basis of treatment, working together, records, organization, workers, together with many sample forms that may be used for recording work done. The volume will be helpful to all who are engaged in this work, and is to be particularly commended to the managers of hospitals, who may have in mind the introduction of this department.

Comparative Prices, Canada and the United States, 1906–1911. Pp. 316. Ottawa: C. H. Parmelee.

CURRAN, JOHN P. *Freight Rates—Studies in Rate Construction.* Pp. v, 367. Price, $5.00. Chicago: Railway Text-Book Publishing Company, 1913.

It was the aim of the author of this book "to give in a clear and concise manner the rate bases or structures" upon which railroad tariffs are built. After a brief and unimportant introduction to the volume, the railroad rates prevailing from trunk line and New England territory to Canada and the West are explained. This is followed by a discussion of the rail and lake rates from the trunk line territory west. Subsequent sections of the book take up, in turn, rates from the Central Freight Association territory and from the South and West. The book is a valuable guide to those seeking to understand how the rate systems prevailing between practically all sections of the United States have been worked out. It is a book for reference rather than for reading.

DAVIS, WILLIAM WATSON. *The Civil War and Reconstruction in Florida.* Pp. xxvi, 769. Price, $4.50. New York: Longmans, Green and Company, 1913.

This volume presents a detailed analysis of the course of the political history of Florida from 1860 to 1876. The work is divided into four parts, the first giving a brief history of Florida before 1860 and an account of the origin and development of the secesson movement; the second dealing with the military events and the political and economic conditions during the war; the third and fourth describing the stormy period of reconstruction with the conflict of federal and local authority, the domination of the alliance of the carpet-bagger, the scalawag and the negro, the reign of lawlessness and crime, and the eventual return of the Democratic party to power.

The history of the events which stand out as landmarks in the progress of the conflict between the free and the slave states has been adequately written. Of the work of filling in the gaps—analysing local sentiment, describing minor details, and showing the effects of the struggle on the everyday life of the people—much remains to be done. Professor Davis has made a noteworthy contribution to the growing number of monographs which are being written with this purpose in view. It is such studies as this which will constitute the material from which may be derived an interpretation and an explanation of the great conflict.

D'EGVILLE, HOWARD. *Imperial Defence and Closer Union.* Pp. xl, 312. Price, 7/6. London: P. S. King and Son, 1913.

MITRA, S. M. *Anglo-Indian Studies.* Pp. xxxv, 525. Price, $2.50. New York: Longmans, Green and Company, 1913.

Mr. D'Egville has very skillfully used the literary remains and political activities of Sir John Colomb, a retired captain of the royal marine artillery, and member of Parliament for some sixteen years following 1869, to show the evolution and status of the program of British imperial defense as based on

the sea power. Colomb was a modern pioneer in the movement to exalt the naval power idea over a defensive military policy favored by the British government, and had a large part in instituting the reforms that led to the creation, in 1904, of the imperial defense committee. The later work of this committee and of various conferences for imperial organization, and the exposition of the principles for which Colomb contended are well presented in five chapters. Two are given to the policy and principles of this defense, two to the imperial coöperation which conditions its success, and one to the imperial representation and union which should result.

The author of the second work, a native Hindu, who has lived eight years in England and won recognition as an interesting writer on Indian subjects, brings together in his volume sixteen miscellaneous articles, some of which have previously appeared in the English reviews. Their value is in showing the native attitude to certain British administrative and other problems in India. Mr. Mitra writes as a Hindu and an imperialist. He believes the safeguard of the empire lies in maintaining a balance between Hindu and Moslem subjects on the divide and rule principle. In the transfer of the capital to Delhi and in the English policy as to the Balkan troubles, he sees undue Moslem influence. He deprecates any democratic movement, such as for colonial self-government, as contrary to the aristocratic spirit of the native princes, who rule something like a third of India.

DUTTON, SAMUEL T. and SNEDDEN, DAVID. *The Administration of Public Education in the United States*. Pp. x, 614. Price, $2.00. New York: The Macmillan Company.

A new edition of a valuable work issued by the same writers in 1908. It contains an additional chapter on moral education; the statistical information is brought down to date. The book presents a fund of valuable information not elsewhere available in a single volume. It is an indispensable reference work to the busy superintendent of schools and an excellent text for classes in school administration.

Not only the administration of education in the public schools is covered, but the administration of all school activities supported by public taxation. There are chapters devoted to the discussion of the chief problems of the administration of correctional education, the education of defectives, compulsory education, and continuation schools. The subject of child labor legislation is also discussed. The writers, both men of extensive practical experience, have chosen for brief treatment about all the current problems in every field of educational administration. The bibliographies appended to each of the thirty-three chapters include only the most valuable papers and books.

EATON, J. S. *Handbook of Railroad Expenses*. Pp. xii, 559. Price, $3.00. New York. McGraw-Hill Book Company, 1913.

This handbook, containing a complete analysis of the system of accounting for railroad expenditures, as prescribed by the Interstate Commerce Commission, should be of great value to railroad statisticians and operating officials,

and to others interested in the study of railroad accounting. The author presents in an abridged form the classifications and rules adopted by the commission together with full explanatory and critical comments of his own. The work is carefully organized and well written.

EHRLICH, EUGEN. *Grundlegung der Soloiogie des Rechts*. Pp. 409. Price, 10m. Munchen: Duncker and Humblot, 1913.

FAIRBAIRN, F. W. *Rate Construction Guide*. Pp. 94. Price, $5.00. Cleveland: The Author, 1913.

This *Rate Construction Guide* shows how to compute through freight rates from Indiana, Michigan (southern peninsula), Ohio, the western parts of New York, Pennsylvania and West Virginia and from Chicago, Milwaukee and Peoria districts to all points in the United States. The object of the publication is to explain the rate systems that have been established by the railroads for traffic from the Central Freight Association territory to other parts of the United States. The book is intended to be a practical guide for those engaged in rate construction. The book does not deal with general principles or theories of rates, but seeks to state exactly what rate systems prevail. A revised edition of the work is published each year.

FAY, C. R. *Copartnership in Industry*. Pp. 146. Price, $1.00. New York: G. P. Putnam's Sons, 1913.

This little manual outlines the history of copartnership, describes and illustrates the various types of copartnership and profit-sharing, and makes clear the real nature and spirit of successful experiments in this field. The following quotations reveal the author's viewpoint: "Freedom is the breath of life to copartnership," "it is not so much a body of things as a body with spirit in it," "when they (students of coöperative and profit-sharing schemes) are studying successes they are studying personalities—studying, in fine, the stuff of which industrial chivalry is made."

GIFFEN, ROBERT. *Statistics 1898–1900*. Pp. xiii, 485. Price, $3.00. New York: The Macmillan Company, 1913.

A posthumous work, consisting of fragments of material under the same general heading, the volume makes clear the interest of the author in statistical data. The introduction deals with the meaning of statistics. The main part of the book includes a number of chapters on area and population statistics, births, deaths and marriages; imports and exports; agricultural statistics; mineral statistics, and the like. The chapters contain a large amount of comment and an inconsiderable proportion of statistics.

GODDARD, HENRY H. *The Kallikak Family*. Pp. xv, 121. Price, $1.50. New York: The Macmillan Company.

A valuable contribution to the subject of heredity; the most important investigation ever made of the causes of human defectiveness; a study of two lines of descent, from the same father and a normal mother in one line, and an

illegitimate union with a feeble-minded woman in the other; the first formal report of the research laboratory of the Vineland School for Defective Children.

The inheritableness of feeble-mindedness is conclusive. In six generations there were 480 descendants in the degenerate line, of whom 262 are known to be feeble-minded. There were twelve unions where fathers were normal and mothers feeble-minded; result, seven feeble-minded and ten normal children. There were eight unions where fathers were feeble-minded and mothers normal; result, ten normal and ten defective children. In forty-one cases where both of the parents were feeble-minded, there were 222 degenerate children and two normal.

Feeble-mindedness has been defined as irregular failure of development. DR. GODDARD'S cases seem to prove this for they present a great variation in the degree of development and many varieties of social irregularity. His work emphasizes the fact that all cases of true amentia must be early recognized by state authority, if any progress is to be made in its suppression. The Vineland institution and Dr. Goddard have placed all the world under obligations by this painstaking study of the heredity of feeble-mindedness.

HART, ALBERT B. *Social and Economic Forces in American History.* Pp. 523. Price, $1.50. New York: Harper and Brothers, 1913.

Professor Hart has reprinted from the several volumes of the American Nation Series the chapters dealing with social and economic conditions. The volume containing these reprints thus presents a concise and most instructive account of living conditions during successive periods. The first two chapters are by President L. G. Tyler and depict "Early New England Life and Social and Economic Conditions of Virginia" down to 1652. From the volumes prepared by Doctors Andrews, Greene, Thwaites, Howard, Van Tyne and others, appropriate chapters are taken—seven chapters by Professor Turner, four chapters by Professor Hart, and one or more by other contributors to the "American Nation." Although made up of the writings of numerous authors, this volume presents a fairly well integrated account of the social and economic forces in American history.

HENDERSON, CHARLES R. *Social Programmes in the West.* Pp. xxviii, 184. Price, $1.25. Chicago: University of Chicago Press, 1913.

Few men in America are better fitted to describe social policies of western countries than Prof. Charles R. Henderson, professor of sociology, University of Chicago. The present volume contains the Barrow lectures, delivered in the Far East in 1912–13. These lectures are six in number: Foundations of Social Programmes in Economic Facts and in Social Ideals; Public and Private Relief of Dependents and Abnormals; Policy of the Western World in Relation to the Anti-Social, Public Health, Education, and Morality; Movements to Improve the Economic and Cultural Situation of Wage-Earners; Providing for Progress of Nation and Humanity.

Though primarily designed for the information of Orientals, they are to be found of value to those of us at home who frequently lose a perspective of the entire field because of interest in some smaller portion thereof.

HOLMES, JOHN H. *Marriage and Divorce*. Pp. 63. Price, 50 cents. New York: B. W. Huebsch, 1913.

This book is written for popular reading and is an effort to steer a safe and sane course between the theories of the "Sacramentarians" who view marriage as indissoluble and the "Libertarians or Individualists" who regard the matter purely from an individual point of view and believe in absolute freedom of divorce. The author believes that when marriage is morally ended it should be legally ended but would throw around marriage all the moral, social and economic safeguards which will make for its continuance. The tone of the book is earnest, rational and constructive.

HUGHAN, JESSIE WALLACE. *The Facts of Socialism*. Pp. 175. Price 75 cents. New York: John Lane Company, 1913.

ADAMS, EDWARD F. *The Inhumanity of Socialism*. Pp. 61. Price, $1.00. San Francisco: Paul Elder and Company, 1913.

Dr. Hughan has set for herself the task of presenting in simple form "the data as to the movement in our country calling itself Socialism, its relation to Marx, labor unionism, the family, the church, the state; its ultimate program, its immediate platform, its leaders, organization and present policy." She has done this well and has written an interesting little volume defending Socialism. Each chapter is followed by a short list of suggested readings and a number of suggested topics for reports and discussions. As a book for beginners and as text book for courses in Socialism it should prove valuable.

The Inhumanity of Socialism shows clearly that the author has not "in recent years, read much Socialistic or Anti-Socialistic literature of which the world is full" (p. 3). Mr. Adam's entire attack is based on the assumption that Socialism will entirely remove the driving force of selfishness and consequently is not worthy of any further consideration. He feels that not only must we retain the struggle for existence but implies that it should be greatly intensified. Socialism is open to attack on many grounds; it is unfortunate that the premises from which an attack is made should themselves be so very weak.

JEBB, RICHARD. *The Britannic Question*. Pp. 262. Price, 35 cents. New York: Longmans Green and Company, 1913.

The author defines the Britannic question as "the problem of how to effect a closer and permanent union between the self-governing states" (p. 9). The problem is first given an historical and a philosophical setting and then alternative solutions are considered at length. Imperial federation as one possibility soon strikes its colors under Mr. Jebb's energetic treatment to a policy of alliance of the autonomous states of the empire. Separate consideration is given to the effect the two systems might be expected to have on the dependencies, and the work concludes with a criticism of the recent pronouncements on the imperial question by Mr. Borden and by Mr. Bonar Law. Although written with an avowed bias the book is an instructive and stimulating summary of a controverted issue.

JOHNSTON, R. M. *Bull Run—Its Strategy and Tactics*. Pp. xiv, 293. Price, $2.50. Boston: Houghton, Mifflin Company, 19.3

JONES, CHESTER LLOYD. *Statute Law Making*. Pp. xii, 327. Price, $2.50. Boston: Boston Book Company, 1912.

KNEELAND, GEORGE J. *Commercialized Prostitution in New York City*. Pp. xii, 334. Price, $1.30. New York: The Century Company, 1913.

KRAUS, JUR HERBERT. *Die Monroedoktrin in ihren Beziehungen zur Amerikanischen Diplomatie und zum Volkerrecht*. Pp. 480. Berlin: J. Guttentag, 1913.

LAUBER, ALMON W. *Indian Slavery in Colonial Times Within the Present Limits of the United States*. Pp. 352. New York: Longmans, Green and Company, 1913.

LEOPOLD, LEWIS. *Prestige*. Pp. 352. Price, $3.00. New York: E. P. Dutton and Company, 1913.

The task set by the author of this volume is the rational explanation of the origin, conditions and effects of Prestige. He defends it not as a logical, moral or aesthetic phenomenon derived from mystical sources, but a purely socio-psychological influence. Book I traces the origin of the word from *praestigiae* meaning delusion and its connection with ideas of mystery and juggling through its modification till at last it comes to mean "the favorable appearance of one man in the eyes of another." Its atmosphere is "permanency, large numbers, exaggerated distances between men, and the receptivity of the masses." A discussion of racial and individual characters of recipients closes this part.

Book II treats of the possessors of prestige, its values, means, utility, etc.

Book III is the practical portion of the book in which the influences of prestige in love, economic life, religion, politic, brute force, intellect and abnormality is traced with rare sagacity.

The volume is a constructive and brilliant psychological investigation of an important phenomenon in social life and should take rank among the valuable treatises on social psychology.

LONGUET, JEAN. *Le Mouvement Socialiste International*. Pp. 648. Paris: Aristide Quillet, 1913.

In this volume we have a very valuable and timely contribution to literature of Socialism. Many have been the books defending or attacking socialistic practice and theory but a careful study of the extent and size of the movement such as here given has been lacking. After a short historical sketch of the "international" and of the present International Socialist Bureau at Brussels, the author gives us the standing of the socialist parties in every part of the globe. In the study of each country there is a short historical review and then a discussion of present plans, policies, leaders and prospects. The short bibliography that is appended is suggestive.

LOWENHAUPT, FREDERICK. *What an Investor Ought to Know.* Pp. 152. Price, $1.00. New York: Magazine of Wall Street, 1913.

A very elementary little volume of 152 pages, discussing the position of holders of corporate bonds, the idea of diversification of investments, the most important factors governing safety of bond investments, and the use of railroad and industrial reports as indices of the inherent worth of securities. While it is believed that the author could have stated his ideas in a much smaller space, or in the same space included a much more valuable book, it is undoubtedly true that investors often ignore or are ignorant of the few elementary principles explained, and for this reason there is a real need for books of this kind, which devote considerable space to the consideration of a few very fundamental ideas.

LUDWIG, ERNEST. *Consular Treaty Rights and Comments on the "Most Favored Nation" Clause.* Pp. 239. Akron: The New Werner Company, 1913.

This brief by the consul for Austria-Hungary at Cleveland, Ohio, presents the argument in favor of the exercise by foreign consuls of the right to administer the estates of their countrymen dying intestate in the United States. The cases which have been decided in eleven states are reviewed, an analysis is made especially of the decision of the United States supreme court in the case *In re* Rocca *vs.* Thompson and a comparison is given of the American and European interpretations of the most favored nation clause as applied to the special subject under consideration. The thesis argued is that since the treaty with Sweden, proclaimed March 20, 1911, consuls "have the right to be appointed as administrators" and that the clause allowing them to exercise this power "so far as the laws of each country will permit" does not act as a limitation. Therefore it is concluded that where the state has created a public administrator to handle such cases the state law must yield to the treaty and *a fortiori* the consul possesses the right in states where the statutes make no such provision.

MATIENZO, JOSE NICOLAS. *Le Gouvernement Representatif Federal dans la Republique Argentine.* Pp. 380. Paris: Librarie Hachette and Company, 1912.

This is a French translation of *El Gobierno Representativo Federal en la Republica Argentina,* reviewed in THE ANNALS, May, 1911.

MYERS, ALBERT COOK (Ed.). *Narratives of Early Pennsylvania, West New Jersey and Delaware.* Pp. xiv, 476. Price, $3.00. New York: Charles Scribner's Sons.

This volume of documents concerning the early history of Pennsylvania, West New Jersey and Delaware begins with extracts translated from a Dutch book, first published in 1655, the *Korte Historiael,* etc., by David Pietersz de Vries. This journal by De Vries gives an account of the six voyages which he made between 1618 and 1644. The third of these voyages was to the West Indies, and the fourth and sixth were made to the Delaware. The document

as reproduced gives those parts of the journal which refer to the trips to the West Indies and to the Delaware.

There follow in the volume of *Narratives*, extracts from the writings of Capt. Thomas Yong, 1634; from the "account of the Swedish churches in New Sweden" by Rev. Israel Acrelius, 1759; from the reports of Gov. Johan Prints, 1644 and 1647, and from the report of Gov. Johan Rising, 1654 and 1655. Penn's account of the province of Pennsylvania, 1681, his letter to the committee of the Free Society of Traders, 1683, and also his account of the province of Pennsylvania, 1685, are given. The volume gives much space to Gabriel Thomas' "Historical and geographical account of Pennsylvania and West-New-Jersey, 1698," and to the "circumstantial biographical description of Pennsylvania" by Francis Daniel Pastorius, 1700. These and the other documents contained in the volume make the book valuable as a reference work for students of the early history of the colonies about the Delaware.

O'FARRELL, HORACE HANDLEY. *The Franco-German War Indemnity and Its Economic Results*. Pp. x, 80. Price, 1s. London: Harrison and Sons, 1913.

All who have read Norman Angell's *The Great Illusion* will be interested in this study of the chapter in that volume entitled, The Indemnity Futility. The Garton Foundation and its work deserve to be better known because of the undoubted value of such a movement in furthering the cause of international peace. The author of this small volume does not differ from Mr. Angell in his general attitude but arrives at much the same conclusions in a different manner. The chief point at issue is whether the payment of the indemnity by France was the primary cause of Germany's economic troubles in the following decade. Mr. O'Farrell finds other causes more potent and concludes that "the indemnity played but a small part, if any, in aggravating the financial troubles under which Germany, in common with the rest of the world, suffered," while it actually conferred some benefits.

OSBORNE, ALGERNON A. *Speculation on the New York Stock Exchange, September, 1904—March, 1907*. Pp. 172. Price, $1.00. New York: Longmans, Green and Company, 1913.

This is an interesting but rather superficial discussion of the lack of anything which "tends to bring the volume of speculation in different stocks into approximate conformity with investment buying or selling" and is an outgrowth of the theory that speculation in security markets in general, and on the New York Stock Exchange in particular, causes business depressions, as contrasted with the idea of speculators whose actions are the result of coming conditions which they foresee. As a criticism of the foolish who purchased at the high prices existing before the 1907 panic, and a description of market conditions at this time, this book is excellent, but to assume that the buyers were all speculators and the investors all wise men and draw the conclusion that speculators are therefore lacking in that rare judgment and discounting ability attributed to them, is unwarranted. That some misjudged future conditions in 1906-07 is certain—that they were the speculators, in the Wall street sense of the term, the author has utterly failed to show.

PARCE, LIDA. *Economic Determinism.* Pp. 155. Price, $1.00. Chicago: C. H. Kerr and Company, 1913.

This monograph is an attempt to explain history on the basis of the way in which people make their living. Forms of government, types of social institutions and standards of living are products that arise out of conditions of life and can be comprehended only when these conditions are understood. History that explains cannot be written in terms of "dynasties" or "reigns." It must be told in periods of man's successive achievement in the art of subduing nature. This process is traced by the author through savagery, barbarism and civilization with special emphasis upon the changes produced by the industrial revolution. It is too brief and fragmentary to comprise a thoroughgoing treatise of the subject. It is rather a defense of a point of view.

PARKINSON, THE RT. REV. MONSIGNOR HENRY. *A Primer of Social Science.* Pp. xii, 274. Price, 2s. London: P. S. King and Son, 1913.

This little volume was written for the Catholic Social Guild. It is exceedingly elementary but covers a wide range of topics. Its four parts are: I. Introductory, in which such subjects as social science, sociology, the social point of view and social reform are explained and clearly distinguished from each other; II. Elements of the Social Life, including a study of the individual, the family, the state and the church; III. Economic Relations, covering production, distribution and consumption; and IV, Social Failures, personal and moral aspects and state assistance.

The whole range of material is treated from the ecclesiastical point of view.

PERRIN, JOHN W. *History of the Cleveland Sinking Fund of 1862.* Pp. 68. Cleveland: The Authur H. Clark Company, 1913.

PILLSBURY, ALBERT E. *Lincoln and Slavery.* Pp. 96. Price, 75 cents. Boston: Houghton, Mifflin Company, 1913.

For the solution of a problem peculiarly American in its nature only that man was fitted who was peculiarly American in instinct, training and sympathy. Mr. Pillsbury shows in a convincing manner that Lincoln fully understood that the fundamental issue between the North and the South was slavery; that the permanence of the Union depended upon the complete eradication of that institution; and that the keynote of Lincoln's political career was his struggle for the emancipation of the negro.

Questions of Public Policy: Addresses Delivered in the Page Lecture Series, 1913, before the Senior Class of the Sheffield School, Yale University. Pp. 134. Price, $1.25. New Haven: Yale University Press, 1913.

This book contains four lectures delivered by well known men before the senior class of the Sheffield Scientific School of Yale University in the summer of 1913. The lectures are: The Character and Influence of Recent Immigration, contributed by Jeremiah W. Jenks; The Essential and the Unessen-

tial in Currency Legislation, by A. Piatt Andrew; The Value of the Panama Canal to this Country, by Emory R. Johnson; and The Benefits and Evils of the Stock Exchange, by Willard V. King.

QUICK, HERBERT. *On Board the Good Ship Earth.* Pp. 451. Price $1.25. Indianapolis: Bobbs-Merrill Company, 1913.

With a true journalistic instinct the author approaches the major social problems of the day. His titles are both fanciful and specific. His rhetoric is excellent, and his conclusions regarding the responsibility of society for a careful piloting of the *Good Ship Earth* are convincing. Mr. Quick has what is sometimes called "a social viewpoint," which he has adapted marvelously to a popularised discussion.

SCOTT, WILLIAM A. *Money.* Pp. 124. Price, 50 cents. Chicago: A. C. McClurg and Company, 1913.

This is the second volume in the National Social Science series and attempts to give a concise statement of the main facts concerning money and its functions. It is "designed for the general reader rather than the expert or the young student."

STELZLE, CHARLES. *American Social and Religious Conditions.* Pp. 240. Price, $1.00. New York: Fleming H. Revell Company, 1912.

The volume of literature appearing on any subject is usually a crude index of public interest in the material presented. If this is true in this particular field, and observation seems to confirm such a view, then there is an increasing interest on the part of the church and religious people generally in the new adjustment of the church to the social and economic life of our time. No more virile writer on religio-social topics is to be found than the author of this little volume. Dr. Stelzle has grouped in 240 pages a usable mass of information which ought to be of great value to ministers and laymen not only in increasing practical knowledge, but in providing a motive for constructive service. Topics treated are problems of city and country, the liquor problem, women and children in industry, the immigrant, the negro, the Indian, the Spanish-American, the church's mission in the solution of these problems. The treatment is constructive and opens up a new vision of the function of a live, efficient church with energies centred in a unified program of social advance. An extended survey and outline of work is presented in two valuable appendices. As a handbook of practical information on social subjects the usefulness of the work is greatly impaired for lack of an index.

STUART-LINTON, C. E. T. *The Problem of Empire Governance.* Pp. x, 240. Price, $1.25. New York: Longmans, Green and Company.

The author starts with the assumption that "the only alternative to imperial disintegration is imperial federation" (p. 11); decides in favor of the latter without explaining why; and proceeds to indicate what form federation should assume. An imperial council might do, he thinks, as a temporary makeshift, but the ultimate goal is an imperial parliament where all the constitu-

ent parts of the empire have representation, an imperial executive of the cabinet type, and an imperial supreme court. This federation is to have a written constitution, which the author supplies. The federation thus organized is then informed how to manage properly its most important business, including naval and military defense, finance, taxation, emigration, the tariff, and the diplomatic service.

The method of treatment is purely speculative. The government of an imaginary imperial federation is outlined with little consideration for what might be possible or practicable in any actual federation. Bold assertions are often advanced unsupported by evidence or argument (e.g., pp. 6, 31, 33, 41, 126, 232), and misstatements of fact are not infrequent (e.g., pp. 28, 46, 175).

SUMNER, WILLIAM G. *Earth Hunger and Other Essays.* (Ed. by Albert G. Keller.) Pp. xii, 377. Price, $2.25. New Haven: Yale University Press, 1913.

Some three years ago under the title of *War and Other Essays* Dr. Keller published a volume of the writings of his teacher and associate, Professor Sumner. In the present volume are collected some forty articles, some of which have never been published. These are grouped under three main heads: liberty, fantasies and facts, democracy. Some half dozen, including earth hunger are outside of this classification.

The author was one of the great teachers of his day. He had a genius for compelling men to think. It is fitting that all the work of such a man be preserved in form accessible to future students. The editor is to be thanked therefore for the collection. He has done his part well. It now remains to be seen whether the reading public will appreciate the merit of the subject matter most of which concerns live issues of the day.

TRAWICK, A. M. *The City Church and Its Social Mission.* Pp. viii, 166. Price, 60 cents. New York: Association Press, 1913.

This little volume is one of a series being issued by the Young Men's Christian Association. The material is grouped in six chapters, which seek to show the connection of the city church with family life, public care of children, problem of charity, labor problem, social vice, other religious agencies. Naturally, so great a field imposes a great burden on the author, who tries to condense the chief facts into such brief compass. On the whole, the work is well done. The author's outlook is hopeful, his horizon wide. It should be of value in Y. M. C. A. classes and others of like nature. A fairly full bibliography is given at the end.

TUELL, HARRIET E. and HATCH, ROY W. *Selected Readings in English History.* Pp. ix, 515. Price, $1.40. Boston: Ginn and Company, 1913.

WHITEHOUSE, J. H. *Essays on Social and Political Questions.* Pp. 95. Price, $1.00. New York: G. P. Putnam's Sons, 1913,

WOOD, RUTH K. *The Tourist's Spain and Portugal.* Pp. xvi, 357. Price, $1.25. New York: Dodd, Mead and Company, 1913.

Not a Baedeker and yet not a travel book this lies half between the two. The descriptions are well written, but the mechanics of the journey and an anxiety to omit mention of none of the "liens" of each city make the style at times labored. The instructions are not detailed enough to allow the traveller to dispense with his guide book. The chapters on Portugal contain much information not found in the usual tourists' manual.

REVIEWS

ADAMS, BROOKS. *The Theory of Social Revolutions.* Pp. vii, 240. Price, $1.25 New York: The Macmillan Company, 1913.

The mind of the complacent lawyer who holds the traditional attitude toward legal interpretation will receive something of a shock upon reading this book. The author is not temperamentally a sensationalist and with a legal training and practice covering more than twenty-five years we have reason to regard his utterances as the result of deep conviction. A casual reading of the book confirms this supposition. His studies have not been confined to the mere technique of legal procedure and the perusal of precedents, but have gone deeply into the social, political and economic forces which shape public opinion and mould law. The present volume is an exposition of the conclusions which are the product of these experiences. But the conclusions are not presented without an exhibit of the material upon which they are based. In Chapter I he discusses what he terms the collapse of capitalistic government which he regards inevitable as the result of the establishment of a new equilibrium. Capital has assumed sovereign power without accepting responsibility. The day of calling capital to account has arrived. Chapter II discusses the limitations of the judicial function and Chapter III American courts as legislative chambers. The assumption of legislative functions on the part of the judiciary uniformly has been followed by extension of authority over the courts by constitutional amendment and other methods. The social equilibrium, Chapter IV, is the force which determines where sovereignty resides and this is illustrated by an appeal to history, especially the events of the French Revolution.

Political courts are discussed in Chapter V and are portrayed as the inevitable precursors of revolution. "During the Reign of Terror, France had her fill of political tribunals."

The concluding chapter on inferences is constructive and logical on the basis of the premise laid down in the previous chapters. Civilizations have broken down through administrative difficulties. "The rise of a new governing class is always synonymous with a social revolution and a redistribution of property." The judicial recall he regards "as revolutionary in essence as were the methods used during the Terror," and would convert the courts into political tribunals and "a political court is not properly a court at all, but an administrative board whose function is to work the will of the dominant faction for the time being. Thus, a political court becomes the most formid-

able of all engines for the destruction of its creators the instant the social equilibrium shifts." The remedy lies in an untrammeled and independent judiciary. Since we are not traveling in that direction, the inference is clear.

Many readers will hardly agree with the premises and hence will object to the conclusions. But we have here a thought-provoking work and one well worth pondering in the light of contemporary facts.

J. P. LICHTENBERGER.

University of Pennsylvania.

ALEXINSKY, GREGOR. *Modern Russia.* (Trans. by Bernard Miall.) Pp. 361. Price, $3.75. New York: Chas. Scribner's Sons, 1913.

Though not a systematic discussion of the Russia of our time, this book contains much material of value to the students of contemporary institutions. The author's experience as a member of the Duma gives him intimate knowledge of its workings, or rather of its powerlessness to do creative work, and his access to material in Russia opens to him fields closed to most western European writers. The chief criticism of the style is the author's tendency to discursive language. Pages of concrete facts, which furnish excellent pictures of phases of Russian economic and political life are followed by others which are indefinite or unrelated to the subject discussed. The volume is far from the standard of Palme's *Russische Verfassung* or Chasles' *Le Parlement Russe*, neither does it have the solidity of Milyoukov's *Russia and Its Crisis*. On the other hand, it is much more easily read than any of these and will probably familiarize more people with the general lines of Russian national development, its economics and its governmental organization.

Four chapters on the physiography and history of Russia introduce the discussion of modern conditions. The treatment of the latter shows great confidence in the potentialities of the country and its people and marked pessimism as to the present outlook. Three features of Russian life limit the realization of the nation's proper development. Economic interests are in the hands of a comparatively small group bent on keeping things as they are and reaping the greatest possible immediate profit. The large landholders squeeze from the peasant the last kopeck beyond the barest existence. Politics are controlled by the same group. The Duma is a farce. Indeed though the people were fired with the hope that the first and second Dumas might accomplish something to ameliorate conditions they have now lost interest in the meetings.

The result of the control of politics and economics by the reactionaries is reflected in bad social conditions. The chapters dealing with these subjects are the best in the book. Sanitary conditions are deplorable, over 80 per cent of the people are illiterate. Social conditions have hardly progressed farther than the feudal state, personal morality is held in light esteem, the police system contributes to disorder and the system of taxation discourages enterprise.

In this dark picture the only hopeful features are the work done by the Zemstvos in the development of local self-government and the gradual awakening of the wealthy classes to the backward condition of their fatherland.

The concluding chapters on the church and literature of Russia are sketchy and unsatisfactory.

CHESTER LLOYD JONES.

University of Wisconsin.

ASCHAFFENBURG, GUSTAV. *Crime and Its Repression.* Pp. xxviii, 331. Price, $4.00. Boston: Little, Brown and Company, 1913.

HOPKINS, TIGHE. *Wards of the State.* Pp. viii, 340. Price, $3.00. Boston: Little, Brown and Company, 1913.

In order to arouse the public conscience in regard to any social wrong, two things are necessary. First, a careful collection of data must be made and generalized in a scientific manner. Second, upon the basis of this knowledge there must be a persistent propaganda. Both these demands are being met in the modern literature of criminology and penology. To the first type belongs the work of Aschaffenburg; to the second, that of Hopkins.

Crime and Its Repression is a careful, critical and constructive piece of scientific work. It is based upon German conditions, but its method is equally applicable to any other country. Theories in regard to crime are examined in the light of obtainable facts and, in numerous instances, are shown to rest upon insufficient data. The thing that impresses the reader throughout the work is the emphasis laid upon the necessity of seeking adequate causes for the phenomena.

Parts I and II are devoted respectively to the consideration of the social causes, and the individual causes of crime. In the former are discussed those causes which lie outside the individual in changes of season, race and religion, city and country, occupations, alcohol, prostitution, gambling, and economic and social conditions. The method is one of careful criticism of available statistics as one of the chief sources of erroneous conclusions, but no effort is made to discredit their use. In the latter, the causes which lie within the individual are studied. These include parentage and training, education, age, sex, domestic status, physical and mental characteristics of criminals and mental diseases. Neither heredity nor environment alone is sufficient to exhibit the real nature of the anti-social act we call crime. It is the joint product of all the elements involved, and can be understood only when all factors are given their full value.

Not until this survey is made are we prepared to consider the treatment of the criminal which the author reviews in Part III under the caption, The Struggle Against Crime. Here in the same critical manner are reviewed such subjects as prevention, responsibility, the purpose and means of punishment, indemnification, suspended sentence, probation, etc. In his conclusions, the author may be classed among the leading advocates of the individualisation of punishment. In fact, the only sane method of repression is not in the repression of the unfortunate victim, but in the elimination of the causes which create the victim.

This volume is the sixth in the list of foreign books selected for translation by the American Institute of Criminal Law and Criminology.

The author of *Wards of the State* for years has been in the position to

make first-hand observations of the methods and the results of imprisonment of offenders, and has presented this treatise for the purpose of arousing the public mind to action in regard to the elimination of palpable social wrongs.

Beginning with the statement that "Imprisonment, its effects upon the prisoner and the prejudice it creates against him in the public mind" are the chief topics of consideration, he describes in graphic style the conditions of penal servitude and prison labor at Portland and other institutions, and shows the old archaic system now so thoroughly discredited has not yet been displaced even in enlightened England. This is the content of Part I.

Part II, labeled Preventive is a treatise of only one aspect of the subject of prevention—that of detection and identification of criminals. Chapters are devoted to the subjects of Bertillonage and the finger print, crime and the microscope, crime and the camera, the police dog, the jiu-jitsu for the police. These chapters are interesting and informing reading, but one may affirm as certainly of these as the author does of the prison, that the efficacy of these methods perfected to ever so high a degree would have little or no perceptible influence in the diminution of crime. If the prison itself is no deterrent, it is hard to see how a system that would result in putting more men into prison would increase its value as a preventive.

Part III contains two excellent chapters on the futility of flogging and the inequality of sentences but its chief burden is the demonstration of the failure of imprisonment, either to diminish crime or to work the reformation of the criminal. He regards the prison as "the tragi-comedy of our day," graduating the offender to a criminal career, and branding him with a stigma that makes it impossible for him ever to have a fair chance for normal life. The greatest condemnation of the prison is the absolute lack of confidence on the part of the public in its product. Chapter XX, entitled New Horizons, is the only constructive portion of the book. Here the author sketches the outline of a real system of "prevention" through the treatment of the causes of crime; the abandonment of retaliative and retributive punishment; the methods of rehabilitation of the offender.

The book is neither logical in its treatment nor comprehensive, and its title is something of a misnomer, yet it contains much valuable material and will tend further to render unpopular our scientifically discredited system of penal servitude.

J. P. LICHTENBERGER.

University of Pennsylvania.

BARRLEIN, HENRY. *Mexico: The Land of Unrest.* Pp. xxiv, 461. Price, $3.75. Philadelphia: J. B. Lippincott Company, 1913.

Existing confusion in the public mind with reference to the Mexican situation is traceable very largely to the fact that but few persons are acquainted with the antecedents of the present situation. The long period of anarchy which followed closely on the heels of the Declaration of Independence; the successive attempts to establish popular government in the absence of any of the elements upon which popular government must rest, and finally the adoption in 1853 of a constitution far in advance of the political training and

preparation of the people: these are all elements in the Mexican situation which tend to explain present conditions.

The work of Mr. Baerlein is a valuable adjunct to the study of present conditions. In his capacity as correspondent of the *London Times* he visited many different sections of the country. His keen sense of dramatic contrasts enables him to paint an exceedingly vivid picture of conditions prevailing during the long presidency of Porfirio Dias.

The author has evidently concentrated his attention on the shortcomings of the Dias administration. He fails to take into account the fact that during its early years, the fundamental problem was to establish something approaching order throughout the confines of the Republic. In the accomplishment of this purpose some ruthless measures were no doubt adopted, but it must also be borne in mind that the national administration had to deal with a lawless element which, while not forming any considerable percentage of the total population, was able to create a feeling of insecurity throughout the country.

The author dwells at length on the mistakes of the Dias administration and the corruption which existed amongst officials. As to the extent of such corruption there are wide differences of opinion. It is true that influential persons were able to secure special concessions and franchises and amassed large fortunes through such special privileges. It is also true that large land owners were able to increase the extent of their holdings at the expense of their weaker neighbors. Opposition to the Dias régime, especially if it took the form of political agitation, was ruthlessly suppressed.

All of these facts are brought out with great clearness by the author, but he fails to point out one of the most important shortcomings of the policy of President Diaz, namely the failure clearly to appreciate the fact that the development of the country's wealth did not necessarily mean a corresponding advance in its welfare. Porfirio Dias concentrated his efforts on the utilization of the natural resources of the country, but he failed to accompany his efforts in this direction with the proper safeguards to the interests of the working classes. While, therefore, the country advanced rapidly in wealth during his administration, the condition of the farm laborers and miners did not show a corresponding improvement.

In spite of a certain lack of proportion the book of Mr. Baerlein is a valuable contribution to a study of the antecedents of the present situation in Mexico.

L. S. ROWE.

University of Pennsylvania.

CHAPIN, F. STUART. *Introduction to the Study of Social Evolution.* Pp. xix, 306. Price, $2.00. New York: The Century Company, 1913.

This book is an attempt to present in usable form the more elementary aspects of biological and anthropological material of social evolution for elementary classes in sociology. Part I with three chapters on variation and heredity, struggle for existence and the origin and antiquity of man presents the essential phases of organic evolution. Part II with six chapters on association, the influences of physical environment, social heredity,

races and peoples, tribal society, and the transition from tribal to civil society, surveys the main aspects of social evolution. At the end of each chapter is given a selected bibliography of the standard works from which the material is drawn.

Like many other teachers the author has felt the need for a collection of the material to be put into the hands of the student. So varied and scattered are the sources that the average library is entirely inadequate in duplicate copies to supply a class of any considerable proportions with facilities to pursue the studies for themselves through assignments. As a result the lecture method of instruction has been often a necessity in this subject. How well this volume will meet this need can be determined only by use. The reviewer is of the opinion that its practical utility would have been enhanced greatly had it been somewhat more comprehensive. It will require much in the way of lecture and further explanation.

The material is well selected and presented. The order is logical and scientific. Considerable emphasis is placed upon the illustrations which illuminate the text and which otherwise would be inaccessible to the average student, called as they are from such a wide range of sources.

We believe the author has done a real service not only in emphasising the need for the constructive study of developing society but also in rendering the material for such study more available.

J. P. LICHTENBERGER.

University of Pennsylvania.

COLLIER, PRICE. *Germany and the Germans from an American Point of View.* Pp. xii, 602. Price, $1.50. New York: Charles Scribner's Sons, 1913.

In two earlier books, *The West in the East* and *England and the English*, Price Collier, writing from an American point of view, has given an interesting and suggestive account of the people of the East and of England, and of their customs and problems. The present work is a similar study of Germany and the Germans.

The first two chapters trace the historical development of Germany. Chapter III deals in a friendly way with the present Emperor, William II, a man who has impregnated the German people "with his own aims and ambitions, to such an extent, that they may be said, so to speak, to live their political, social, martial, religious, and even their industrial, life in him." Mr. Collier professes the greatest sympathy with the kaiser in his capacity as war lord, and in his insistent stiffening of Germany's martial back-bone, yet believes that the German Emperor is far and away the best and most powerful friend that the English have in Europe.

The place of the newspaper and the power of the journalist is said to be increasing rapidly, but as yet neither the press as a whole, nor the journalists, with a few exceptions, exert the influence on either society or politics of the press in America and England. A good word is said for German cities, which in the great majority of cases present no loopholes for private plunder, and which are administrated by experts, not by politicians.

Chapter VI, on a land of damned professors, proves a disappointment, not because of its account of the German system of education, but because the part which the professors in the German universities have played in the industrial development of Germany receives hardly more than passing mention.

In a chapter entitled ohne armee kein Deutschland, the author minimizes Germany's warlike intentions. Political geography provides a sufficient excuse for Germany's army and navy. The supposedly bellicose army, in an existence of over forty years, has done far more to keep the peace than any other one factor in Europe, except, perhaps, the British navy. Furthermore, the Germans want peace, but being the last comers into the society of nations, they mean to insist upon recognition.

In conclusion the author expresses the conviction that Germany is confronted with a grave internal danger arising out of the fact that its marvelous development of recent years has been artificial, because forced. It is not possible, merely through the natural development of its innate characteristics, for a nation to change in one generation, as Germany has changed. Consequently it is felt that there is little ground for the belief that the German nation is to save the world by Teutonizing it. The scarecrows of autocracy, bureaucracy, and militarism are not destined to live, much less to be transplanted to other countries.

ELIOT JONES.

University of Pennsylvania.

COMMONS, JOHN R. *Labor and Administration.* Pp. ix, 431. Price, $1.60. New York: The Macmillan Company, 1913.

We should be very grateful to Professor Commons for this collection of essays and studies. Many of us who have been reading with great interest his suggestive articles in various magazines will re-read them in this volume, and will be glad, moreover, that the more recent ones are made so readily accessible in bound form. Among the twenty-two studies in the volume, there are a number that deal with the philosophy of the labor movement and of the labor conflict, such as the union shop, restrictions by labor unions, and the class conflict. Another of this group is one on unions and efficiency, in which for the first time the reasons for the hostility of organized labor to the efficiency movement are analyzed, and the need shown of adopting "methods that will recognize the mutability and solidarity of labor and convert this craving for harmony and mutual support, as well as the impulse of individual ambition, into a productive asset." In the volume are the remarkable studies of American shoemakers, the longshoreman of the Great Lakes and the musicians of St. Louis and New York. The first of these stands as one of the most interesting studies in economic history and it is a distinct gain to have it reprinted. The closing studies of the volume contain the results of the author's experience as a member of the Wisconsin Industrial Commission. He emphasizes not only the importance of the administration of labor laws, but the need for adequate administration. As Professor Commons is the originator of the Wisconsin experiment in this field and has been one of its first ad-

ministrators, these studies are of particular value. A sentence in the introduction truly summarises the underlying thought of the essays: "Through them run the notions of utilitarian idealism, constructive research, class partnership and administrative efficiency—a programme of progressive labor within social organisation." No person interested in economic or in labor history can afford to be without this volume.

ALEXANDER FLEISHER.

Philadelphia.

DEWSNUP, E. R. *Freight Classification*, 4 vols., pp. ii, 304; TRIMPE, W. A. *Freight Claims*, pp. 62; MORTON, J. F. *Routing Freight Shipments*, pp. 27; STROMBECK, J. F. *Reducing Freight Charges to a Minimum*, pp. 68. Chicago: La Salle Extension University, 1913.

In addition to the *Atlas of Railway Traffic Maps*, previously mentioned in THE ANNALS, the La Salle Extension University has issued the above-named treatises on freight classification, freight claims, freight routing, and reducing freight charges. They are among the various lessons of an extensive course on interstate commerce now being prepared under the direction of that institution.

The description of freight classification was written by Prof. E. R. Dewsnup of the University of Illinois. After describing briefly the past development of classification it outlines in full the present application of the Official, Southern and Western classifications, the manner in which classifications are made, and the rules contained in the classification books. Volume four contains in convenient form for the use of students a series of appendices explaining territorial and technical traffic terms, abbreviations used in traffic publications, and the application of the leading classifications.

The remaining lessons are briefer and are presented in a more technical form. Mr. W. A. Trimpe of the Chicago bar describes the nature and kinds of freight claims, how, by whom, and to whom they are presented, the forms and documents used in making claims, and the manner in which they are handled. The lesson on reducing freight charges to a minimum was prepared by Mr. J. F. Strombeck, president of the Strombeck-Becker Manufacturing Company. It points out the methods by which shippers may assure to themselves the lowest available freight charges. Mr. J. F. Morton, assistant traffic director of the Chicago Association of Commerce in the lecture on routing freight shipments briefly discusses the ways in which the proper routing of freight benefits shippers. Being especially designed to assist young men who expect to enter or have entered some one of the many branches of interstate commerce, these lessons though brief are essentially practical.

GROVER G. HUEBNER.

University of Pennsylvania.

DUNN, SAMUEL O. *Government Ownership of Railways*. Pp. vii, 400. Price, $1.50. New York: D. Appleton and Company, 1913.

Mr. Dunn's book is a readable and clear presentation of issues that will confront the public in this country, if government ownership and management

of the railways should be undertaken. The considerations involved have long needed a popular treatment—one that would not be wrapped in the obscurity that envelops many scholarly works on the problem of transportation. Perhaps a readable and condensed book of this sort will be of more service than the published results of many exhaustive investigations.

The examination which the author makes of the interaction of politics and railways owned by the government is most useful at the present time. In general discussions, particularly, the probable growth of corrupt relations between railway officials and public servants, under either government or private ownership, has been the subject of many carelessly sweeping statements. A glance at the evidence bearing on this matter which Mr. Dunn brings forward will tend to make unqualified assertions somewhat less common than they have been. Economists and students of railway matters have learned caution in forming or expressing opinions; popular prophecies should become more balanced if such books are widely read as this deserves to be. The author's concluding decision is definitely against government ownership; and he reaches it, after a fair and critical weighing of available evidence, without any of the labored arguments from analogy that have been customary in popular works on the subject, and have served to darken counsel.

There are few situations where public ownership and private operation exist. A rather full notice of this possible solution would not have been out of place. Abuses of delegated powers of ownership, rather than of pure operation, have made the present situation acute. Present evolutionary tendencies however point to government ownership and operation and possibly call for a consideration of government operation, as well as ownership, rather than of the possible outcome just indicated.

A. A. OSBORNE.

University of Pittsburgh.

FERGUSON, WILLIAM SCOTT. *Greek Imperialism.* Pp. xiv, 258. Price $2.00. Boston: Houghton, Mifflin Company, 1913.

This book contains a course of six Lowell Institute lectures delivered in February, 1913, to which a seventh has been added to make the list of Greek experiments in imperialism complete. It traces the development of imperialistic ideas and practice in the empires of Athens, Sparta, Alexander, the Ptolemies, Seleucids, and Antigonids, from the germinant form in the city-state, through the deification of rulers as a bond of interstate union, to the nice balance of the federal system, and makes clear the manner in which the Greeks prepared the way for the unification of the world under the empire of Rome. The judicious selection of material and the clear and well-balanced treatment reveal fullness of knowledge and penetrating insight into historical processes. Such a guide-book has value for the student of ancient history and government, and is a timely aid to the general reader in view of present-day tendencies and discussions, for it corrects widespread misconceptions as to what Greek governments really were, and as to the causes of the metamorphosis of city-states from ultimate to constituent political units. Some readers will be surprised to learn that there was "no such thing in Athens as the final settlement

of controversial matters by a single popular vote," and still more perhaps to read that if "we take into account the ratio of dominant, subject, and foreign elements, and also the time consumed in reaching with ships, orders, or explanations, the outer limits of authority, the magnitude of Athens' imperial undertaking will stand comparison with that of England in modern times."

Frequent *obiter dicta* are both enlightening and pertinent, such as, "The Greeks still have something to teach us as to the educative power of great poetry;" and, "the singleness of purpose with which Sparta made vocational training the aim of her public education achieved the happy result that she had no men of letters to betray to posterity damaging secrets of state." The author's graphic style paints many a vivid picture like this of the end of the Seleucid empire, "Then, the blackened hulk, manned by a mutinous crew, lay helpless in a sea infested with pirates, when Pompey picked it up and towed it into a Roman harbor."

Only a few errors have been noted. Chronus appears for Cronus (p. 143), Calchis for Chalcis (p. 230), and eight months are spoken of as three-fourths of the year (p. 69). The minimum panel of Athenian jurymen should be 201 instead of 401 (p. 49), the statement that men of large wealth in Athens "volunteered" to support the theatre, etc., ignores the frequent attempts to evade what was really a legal requirement (p. 65), and there is scant justification for the inclusion of Herodotus and Hippocrates with Sophocles, Phidias, et al., among the men produced by the Athenian régime (p. 74).

But defects are few and slight. The book is interesting, instructive, and stimulating, the name of the publishing firm guarantees its excellence in externals, and a select bibliography and an index contribute to its usefulness.

FRANK EDWARD WOODRUFF.

Bowdoin College.

GARNEAU, FRANÇOIS-ZAVIER. *Histoire du Canada.* (*Bibliothèque France-Amérique.*) Cinquième édition, revue, annotée et publiée avec une introduction et des appendices par son petit-fils Hector Garneau. Préface de M. Gabriel Hanotaux, de l'Académie Française. Tome I. Pp. lv, 610. Paris: Félix Alcan, 1913.

This book is unique as the combined work of two French-Canadian historians, belonging to the same family, but separated by two generations. Francois-Xavier Garneau, the original author (1809–1866), was a Liberal of the early Victorian era in Canada. His views upon the history of his race took the color of his own patriotic nationalism; yet, devout Catholic though he was, upon questions of Church and State (a very engrossing subject in French-Canadian history), he shared with contemporary Liberals an enlightened disapproval of extreme clericalism. The better part of his life he devoted to a study of the material of Canadian history, and, adopting the style and method of Michelet, he achieved the distinction of writing, in point of time, the first national history of French Canada, and certainly, as yet, the best.

It seems appropriate that his history should be selected by M. Hanotaux for the Comité France-Amérique as the initial number of their Bibliothèque,

a series planned by the committee with the object of furthering mutually the cultural relations between America and France. The republication of the work in Paris, under such patronage, points anew to the historical interest of France in America—not only as a past field of colonial enterprise, but also as the present home of some millions of French people, retaining vigorously their national distinctiveness, and preserving a national culture, of which the scholarship of Garneau is such an eloquent testimony. On this side, a history dealing with the place of France in the beginnings of America is always welcome; but the Comité France-Amérique has placed the reception of this work beyond a doubt by means of a new edition, the fifth, in which the original acquires an altogether different value.

By offering the revision of the work to M. Hector Garneau (a grandson of F.-X. Garneau), the Comité France-Amérique secured an editor who desired, as a tribute to the memory of the first historian, to enhance the usefulness of the book by making it accord with the requirements of recent historical scholarship. M. Hector Garneau has brought to his task a very extensive knowledge of the sources and literature of Canadian history; and, as editor only, he has been content to use for bibliographical references and appendices material which might well have made a work under his own name. By relating the text of the original to all the material now available for study and research, he has, in effect, transformed a classic of the early nineteenth century into a model of critical thoroughness. It would be difficult to say whether the volume at hand owes more to the excellent narrative style and philosophic grasp of the author, than to the critical revision and annotation of the editor: for what is editorial in form has often a substantive value that can hardly be dissociated from authorship. In its present edition the combined work of author and editor makes the most complete general history of French Canada that we have; and one which, while always acceptable in earlier editions, has now become invaluable.

C. E. FRYER.

McGill University, Montreal.

HEAPE, WALTER. *Sex Antagonism.* Pp. 217. Price, $1.50. New York: G. P. Putnam's Sons, 1913.

A book devoted to the sex question, now so much in the public mind, written from the biological point of view, ought to be of peculiar interest. The author's frank avowal that one aspect of the present social unrest is due to an almost universal ignorance of the part sex plays in race development and in modern civilization is worthy of consideration. The book is written as a criticism of Frazier's theories of Exogamy and Totemism which mean little to the lay mind. He disagrees with Frazier as to the origin of these universal customs in primitive society, regarding Exogamy as due to the instinctive sex impulses of the male, while Totemism is a feminine creation which has special relation to the function of maternity.

His main contention, of vital importance to the social student in general, is that the biological differences in sex express themselves in all phases of life in a fundamental difference in sex impulses and instincts which are strongly

opposed to each other. "Thus the male and female are complementary; they are in no sense the same and in no sense equal to one another; the accurate adjustment of society depends upon the proper observance of this fact." Sex antagonism is the result of the disturbance of complementary relations in an artificial society the practical significance of which is exhibited in the modern feminist movement. Beginning in inter-sex antagonisms it culminates in intra-sex conflict, and the author sees great danger in the tendency to develop the latent secondary male characters in the female sex. He says: "By training her recessive male qualities she can never attain to more than a secondary position in the social body; but by cultivating her dominant female qualities, by increasing their value, she will gain power which no man can usurp and will attain that position as a true complement of man which is essential for the permanence and the vigor of the race."

Many readers will feel that the writer has exaggerated the differences in sex characters of men and women, but that it is a subject too much neglected, all who realize its fundamental importance will readily admit.

The book is thought-provoking, presents an old subject in a new light, and is worthy of serious study by all who view with concern the new adjustments required by modern civilization.

J. P. LICHTENBERGER.

University of Pennsylvania.

HOLLAND, BERNARD. *The Fall of Protection.* Pp. xi, 372. Price, $3.00. New York: Longmans, Green and Company, 1913.

The author of this book states in the preface that though he has not exerted himself to be *impartial*, yet he has tried not to be unfair, in the sense of suppressing or misstating facts and arguments which support opinions not his own. This purpose has been steadily maintained in the main part of the work, which consists of an account of the protective system in Great Britain and its fall from 1840 to 1850. Throughout the explanation of the old national system and the colonial system, and in the narrative of Peel's fiscal reforms, 1842–1845, the battle of the corn laws, Peel's conversion, and the repeal of the corn laws and the navigation laws, our author is not only not unfair, but rather gives the impression of impartiality. The general direction in which his sympathies lie is indicated, however, by his minimising, through a failure to say much about it, the important part which Richard Cobden played in the struggle for repeal. It is indicated also by his belief that it was a mistake to assert that the corn laws had raised or maintained rents, farming profits, or bread prices; or, at least, it was a very great exaggeration of the practical effects of those laws. It is open to question, or at least difficult to prove, he maintained, whether the English corn laws, *while they lasted*, ever raised the rent of a farm, or the profits of a farmer, or the price of a loaf. This position, however, seems untenable, when we consider that the price of wheat in England in 1842 (to take our author's own figures) was 57s. per quarter, whereas in Germany it was only 40s. The freight to London being 5s. per quarter, the duty must have kept the English price artificially high, and therefore main-

tained British rents and bread prices higher then they would otherwise have been.

In the closing portions of the book, which present a brief account of the existing tariff system, the leanings of the author are more apparent. It is pointed out that the fiscal revolution of 1846 was made possible by the fact that England's supremacy at sea was unchallenged, which gave her assurance of foreign food supplies; by the fact that England possessed a subject empire which could be held open by force for England's exports; and by the fact that England's manufacturing power was unrivaled. But at the present day British control of the sea is no longer unchallenged, the colonies of the British Empire have adopted protective tariffs, and England's manufacturing power is subject to keen competition. As English agriculture was ruined, so by a later development in the same process, unless steps are taken to prevent it, will English manufactures be destroyed. The author believes that this development can be prevented by the adoption of the Chamberlain plan, a reform based upon the national policy of moderate protection and colonial preference abandoned by Peel in 1846. The Chamberlain proposal has been defeated, it is true, but its principle has been accepted by one of the great British parties; it is being resisted more and more weakly by the other; and, if signs can be trusted, it will be carried into effect, in some shape, at no very remote date.

ELIOT JONES.

University of Pennsylvania.

HOLMES, ARTHUR. *The Conservation of the Child.* Pp. 345. Price, $1.25. Philadelphia: J. B. Lippincott Company,

The title of this book, while applicable, does not give the prospective buyer an adequate index to its contents, as the title of all serious books should do. The subject is the mental and physical deficiency of certain children. If the sub-title were used in the place of the one printed on the covers, the buyer would know exactly the nature of the book: "A Manual of Clinical Psychology presenting the Examination and Treatment of Backward Children." To be sure, it is a discussion of the conservation of some children, probably 10 per cent of all of them. Such a valuable book should not be issued without an index.

Dr. Holmes has been associated with Dr. Witmer almost since the beginning of the work of the psychological clinic, the initial attempt to use clinical methods in the investigation and treatment of troublesome school children, and his book is the result of the sixteen years' work of the clinic. The first chapter is a historical sketch of the treatment of feeble-mindedness. Following this is a description of the establishment and organisation of the psychological clinic in the University of Pennsylvania. Nearly one-half of the book is taken up with the discussion of the cases which have appeared in the clinic. Most of this discussion is extremely valuable. The cases are well chosen but would be more serviceable if a complete history of each individual case were given, as Huey has done in his case book of backward children. One of the most

interesting chapters of the book is that in which the author discusses the subject of "moral deviates." The book closes with the chapter upon the sociological relations of the clinic. It is of vital interest to public school people who are abreast of the time and who consider it a part of their duty to strengthen the weak and to give proper assistance at the right moment to unfortunate children. It is another valuable addition to the technical library of the child welfare worker and is a handbook for use in the psychological clinics now being organised in various universities, normal schools and social centers.

A. H. YODER.

Whitewater, Wis.

KNIFFIN, WILLIAM H., JR. *The Savings Bank and Its Practical Work.* Pp. vi, 551. Price $5.00. New York: The Bankers' Publishing Company.

As indicated by the title this study of the savings bank is a practical one. After a brief account of the savings bank movement both abroad and in the United States and a discussion of the nature, functions and value of such banks, the author surveys the situation in the United States at the present time. He finds that most of the mutual institutions are in the East and North. There are only ten west of the Mississippi River, nine of which are in Minnesota and one in California. None is to be found south of West Virginia. The reasons are found to be the commercial motives that prompted the settlement of the South and West and the preponderance of agriculture which affords few idle funds for investment. There are, of course, many stock savings banks in all parts of the country.

The remainder of the volume describes organization and practical work. The New York law is declared to be the model and the description follows its requirements with frequent references to the laws and the practice in other states which differ from New York. The duties of the trustees and the various officers, the by-laws, the method of making deposits and withdrawals are treated in successive chapters. Devices used in different banks are compared and various swindling methods are described. The uses of the new card and loose leaf systems of keeping records are discussed. The old style ledger is condemned and the common argument against loose leaves and cards that they are not legal evidence in court proceedings is answered by the assertion that the courts have ruled that it is the original entry that counts. Hence, says the author, the ledger has no better chance than cards, since the ledger is usually not a book of original entries.

The entire business of the savings bank is clearly and adequately discussed. Illustrations are numerous and varied and a large number of forms and records are inserted. In addition the book is well arranged and attractively bound and printed. It is, so far as the reviewer knows, the only satisfactory recent treatment of the subject and it is certainly done in a most capable manner.

E. M. PATTERSON.

University of Pennsylvania.

KNOOP, DOUGLAS. *Outlines of Railway Economics*. Pp. xvi, 274. Price, $1.50. New York: The Macmillan Company, 1913.

ELLIOTT, HOWARD. *The Truth About the Railroads*. Pp. xxi, 259. Price, $1.25. Boston: Houghton, Mifflin Company, 1913.

The book on *Railway Economics* by Mr. Knoop, lecturer at the University of Sheffield and at the Midland Railway Institute, contains an instructive account of railroad rate-making and railroad regulation in Great Britain. British railroads being operated by private companies are of particular interest to the American reader. The demand for an increase in freight rates, which is now the topic of widespread discussion in the United States, has already been granted in the United Kingdom. So too the problem of railway combination and consolidation has been decided in that country; and British railways are likewise being subjected to an increasing amount of public regulation. The volume contains several instructive chapters on the methods of making freight rates and fares in Great Britain, outlining fully the conditions which influence rates. It similarly describes the methods of making the British freight classification, and the way in which passenger fares on British railroads are made. The various forms of railroad combination are divided into two groups: first those which cause the parties to the agreement to have one management, and second, those which leave each party to the agreement under independent management. Railway combinations of the first type are brought about by amalgamation, by lease, by a so-called "working union," and by working agreements. Those of the second type result from the conferences of railway officials meeting at the Railway Clearing House, from pooling arrangements whereby earnings are divided, from agreements concerning the division of territory, and from agreements to facilitate the handling of through traffic. Coöperation has long superseded competition in Great Britain, and railway combinations have been legalized.

The author does not under present conditions look with favor upon the tendency to increase the strictness of public control. His opinion is not unlike those of many American railway managers. "At the present time," says Mr. Knoop, "the proprietors of the railway companies find themselves being gradually deprived of the power of conducting their undertakings on business lines. They have to bear the whole of the risks, yet new conditions, involving considerable increases of capital and working expenses, may be imposed on them from outside. That the state should exercise control over privately owned railway undertakings is most desirable, but a position in which the state assumes no financial responsibility of any kind, while imposing from time to time new conditions which restrict the powers of the managements and affect the profits prejudicially, may easily become unfair." The volume closes with an account of the discussion which has recently arisen in Great Britain concerning the ownership of British railroads by the state.

The book entitled *The Truth About the Railroads* by Mr. Howard Elliott is similar to the volume by Mr. Knoop only in that it contains similar views concerning the future increase of public control in the United States. It consists of a series of addresses which were delivered on various occasions by the recently selected chief executive of the New York, New Haven and Hartford

Railroad Company. The tenor of the volume is a plea for a cessation of hostile public sentiment, and for an era of friendly coöperation between railway companies, railway employees and shippers. Mr. Elliott summarizes the present difficulties of American railways as follows: "Upon the one hand there is a critical public. Upon the other, the railroads are struggling with the forces which are causing rates to remain stationary or to decline, causing wages to rise or to remain stationary, bringing demands from a prosperous and luxurious people for increasingly expensive facilities and service, and causing taxation to rise at an alarming rate. These four forces are all at work reducing the margin between income and outgo and making it more and more difficult for the owners of railroad properties to keep their lines in suitable condition to carry on the business of the country, and to obtain a return commensurate with the risk of the business and sufficient to attract further investment."

G. G. HUEBNER.

University of Pennsylvania.

KOSER, REINHOLD. *Friedrich der Grosse. Volksausgabe.* Pp. 533. Price, 6 m. Stuttgart: J. G. Cotta'sche Buchhandlung Nachfolger.

Those who lack the time to read Koser's three volume *History of Frederick the Great* will be grateful for this compact biography in one handy volume by the most competent living authority. This book was prepared to satisfy the popular interest that developed on the occasion of the two hundredth anniversary of Frederick's birth, and it naturally emphasizes the personal element. It consists mainly of extracts from the large work suitably linked together with connecting narrative, so that it does not give the impression of a mosaic. "Those chapters of the large work which are primarily of biographical interest, excluding the technical details of diplomatic, military, and administrative history are reproduced practically complete." The first chapter is an excellent summary in thirty-three pages of the author's small work *Frederick the Great as Crown Prince.* The book realizes excellently the purpose of the author to give a comprehensive, clearly-defined picture of the career and personality of the famous autocrat.

ROSCOE J. HAM.

Bowdoin College.

LAMPRECHT, KARL. *Deutsche Geschichte der jüngsten Vergangenheit und Gegenwart. Erster Band.* Pp. 518. Price, 8 m. Berlin: Weidmann'sche Buchhandlung.

In 1909 Professor Lamprecht published the final volume of his well-known *Deutsche Geschichte,* of which the first appeared in 1891. The first five volumes—through the reformation—came in rapid succession, after which there was a long halt. From 1901 to 1904 he wrote three substantial volumes on recent German History—the "Ergänzungswerk." Then in extremely rapid order appeared the remaining seven volumes of the main work. After a brief interval Professor Lamprecht again took up the subject-matter of the Ergänzungswerk and planned out a new work in six volumes, which he entitles *Deutsche Geschichte der jüngsten Vergangenheit und Gegenwart.*

Volume one describes the economic and social development especially of the latter half of the nineteenth century; volume two the political history of the same period; volumes three and four will deal with the recent history of German science, literature and art and will bring the account down to the date of writing; volumes five and six will take up again the subjects of the first two volumes and continue them to the present.

Obviously no historian could come to such a task with more thorough preparation. The first volume of this new work is a revision with but slight changes of part one of volume two of the Ergänsungswerk. In it we find full expression of the characteristic qualities of the author's philosophy of history. Just as physics and chemistry investigate the permanent laws that underlie the operations of biological evolution, so psychology discovers and states the permanent laws that underlie the processes of history. The fundamental task of the historian is to determine what particular psychic states are dominant in the various epochs of the life of a nation. The dominant forces in Germany during the latter half of the nineteenth century are those that arise from the growth of a capitalistic economy, and the greater part of this volume is essentially an interpretation of recent German History in terms of the steadily increasing influence of free enterprise—der freien Unternehmung. Hardly a phase of the nation's life has escaped the influence of this factor. Now the system of free enterprise with rapid accumulation of capital demands for its successful working a phenomenal expenditure of thought and nervous energy. It has created a new psychic condition: the people have begun to discover their nerves, the man of the hour is the man of high-strung temperament and abundant nervous energy (Bismarck), the neurotic diseases become conspicuous: in short the age of Reizsamkeit—of nervous strain—has come.

Professor Lamprecht deals with his subject largely and generously. He has a rare knowledge of his own day and generation and he has here given us a book that no one who is interested in modern German history can pass by. The literary style of the work is much superior to that of the early volumes of the *Deutsche Geschichte;* rhetorical monstrosities and "alphabetical processions" do still occur, but they are comparatively infrequent.

ROSCOE J. HAM.

Bowdoin College.

LODGE, HENRY CABOT. *One Hundred Years of Peace.* Pp. vii, 136. Price, $1.25. New York: The Macmillan Company, 1913.

The title of this book is a misnomer; it should be "One Hundred Years of Quarreling." The paper cover supplied it by the publishers announces that "in 1914 the American and the English people will celebrate the completion of one hundred years of peace between the two nations. The sigficance of this fact is brought out by Senator Lodge in this brilliant and penetrating sketch of the relations of England and the United States, since the War of 1812."

The book may be considered "brilliant and penetrating" by some others besides its publishers; but, as a matter of fact, it does *not* bring out at all the

significance of the great centenary of peace. Nearly one-fourth of its pages are devoted to a grossly partisan and misleading account of the American Revolution, the ill-feeling of the French Revolutionary and Napoleonic years, and the War of 1912. Two-thirds of the remaining pages record thirty-odd quarrels which arose during the century, and only one-fifth of the book is devoted to the peaceful settlement of those quarrels. Even the short account of these peaceful settlements is marred by a grudging and ill-natured spirit, and the credit for the avoidance of war is given wholly to Americans—wherever at all possible to some Massachusetts statesman. Even the illustrations of the book are in keeping with its contentious spirit. Only seven of them are devoted to peace-making or the peace-makers; while twelve are old English cartoons ridiculing America, or the portraits of the makers of mischief between the two countries. Emulating "Hamlet with Hamlet left out," not the slightest reference is made in these pages to that feature of the Rush-Bagot treaty of 1817 which stilled the war-drums and furled the battle-flags along the nearly four thousand miles of our Canadian boundary line; while Great Britain's assent to the Geneva arbitration of the *Alabama* claims is ascribed to England's unpreparedness for war and her fear of losing Canada! The prime feature of the Cleveland-Olney exaggeration of the Monroe Doctrine, which was repudiated by our own country almost as soon as it was uttered, is passed over in silence, and President Cleveland's bellicose message which brought the two countries to the verge of war is "illuminated" by the words: "England was surprised, and operators in the stock market were greatly annoyed. . . . . President Cleveland, moreover, however much Wall street might cry out, had the country with him, and no one today, I think, can question the absolute soundness of his position."

An author who, from his seat in the United States Senate, heard only the voice of Wall street in the mighty "Thou shalt not commit murder" which went up from the hearts of two civilised nations to their respective rulers in that terrible crisis, and who so obviously exults in the clenching of the mailed fist which precipitated that crisis, can scarcely be expected to interpret aright the hundred years of peace which are presumably to be celebrated by peace-lovers, peace-makers and peace-keepers in a genuinely peaceful spirit.

WM. I. HULL.

Swarthmore, Pa.

MCMASTER, JOHN BACH. *A History of the People of the United States.* Vol. viii, 1850–1861. Pp. xix, 556. Price, $2.50. New York: D. Appleton and Company, 1913.

This volume marks the completion of a work the earlier portions of which have already established themselves as standard authority in American history. The manner of treatment which Professor McMaster has chosen is familiar. The national life is portrayed as it looked to the people of the period which the chapters cover. The main reliance for material is upon newspaper discussions and to a lesser degree the congressional documents of the period. Little effort is made at formal interpretation but the events and persons are made to speak for themselves.

This concluding volume dealing with the years from 1850 to 1861 is especially valuable because of the large number of developments in that period which have left their influence on our present-day life or have marked the rise of problems still unsolved. Constitutional questions such as the relation of the federal government to the territories, and the nature of the union were in the forefront of public discussion throughout the decade, questions of policy such as the treatment of foreigners, railroad extension, and our duty toward the West Indies were subjects of nation-wide interest, and parties were perfecting the organisation of the electorate and clarifying the issues on which the approaching civil war was to be fought.

Few periods better lend themselves to interpretation by the methods Professor McMaster has chosen. The surge of popular opinion in the slavery controversy, the rush to settle the West and to exploit its mines, race riots, labor troubles, Cuban filibustering, the struggle for Kansas, the battles of the constitutional conventions, the party campaigns and finally the formation of the Confederacy; these are events which can be seen in no way more vividly than through the eyes of the contemporary editors and their correspondents.

The intensity of political life in the decade is mirrored in the fact that one-sixth of the five hundred pages of the book is devoted to a description of party conventions and campaigns and about an equal space to discussions of policy in Congress and to the Kansas conflict.

Many of the economic and social conditions emphasized show the earlier stages of problems still unsolved. Chinese immigration begins to trouble the West in the decade, complaints are made against immigrants, railroad control and strikes for higher wages and shorter hours begin to attract public interest, coinage reform and currency problems claim attention.

In a country so large and so rapidly changing as ours has always been, fruitful ground is offered for the development of unusual social phenomena most of which sweep into prominence for short periods to disappear again when new changes destroy the conditions under which they flourished. Of these the period just before the Civil War had its share. Then flourished native Americanism, the woman's rights movement, bloomerism, spiritualism, prohibition, and Mormonism. The closing chapters deal with the strained conditions surrounding the formation of the confederacy and with the events of the conflict up to the inauguration of Lincoln.

Few works of equal size show as much symmetry of plan as this and few will recommend themselves so highly to those who believe history should be a picture of life as well as a record of facts.

CHESTER LLOYD JONES.

University of Wisconsin.

MAURICE C. EDMUND. *Life of Octavia Hill.* Pp. xi, 591. Price, $5.00. New York: The Macmillan Company, 1913.

The gracious presence of the lady whose "counterfeit-presentment" adorns so many offices of charity organization societies in the United States pervades this attractive volume in which the biographer has played for the most part the modest rôle of editor. The book is more ample than the general reader will

find time to absorb, but not too minute or inclusive in its revelation of life and recital of work to meet the wishes of the numerous company of those whose ideals and methods in social service have been inspired and guided by Octavia Hill. The early trials of the family in which the mother's strength and wisdom impressed upon all the children that "if a thing is right, it must be done," gave the keynote of consecration; and the need to earn for self-support gave reality to the sympathy and fraternal feeling which dignified all later work for the poor and ignorant. Canon Barnett's testimony that Miss Hill "brought the force of religion into the cause of wisdom and gave emotion to justice" is well justified by this volume of intimate letters on public and private activity. High gifts of social organization, commanding powers of discipline in dealing with ignorance and wrong-doing, ready response to the commands of human progress were combined in this rare life with inexhaustible patience in personal ministry, abounding faith in human quality if rightly approached, exquisite refinement of feeling, broad culture, deep religious devotion, and self-forgetting daily service. Octavia Hill's name is permanently fixed to what is called "the housing reform." But most methods in this line work from the outside in through "model tenements." Her methods worked from the inside out, from improved people and homes to better houses; and this biography is a treasury of inspiration and guidance to those who believe that we must work to make better folks while we try to make better social conditions. Its clearness of sequence, its delicacy of treatment, and its balance of light and shade are testimonials to the high competence and character of its author and compiler. The book will greatly help in fulfilling the wish of Octavia Hill to leave behind her "greater ideals, greater hope, and patience to realize both."

ANNA GARLIN SPENCER.

Meadville, Pa.

MORISON, SAMUEL E. *The Life and Letters of Harrison Gray Otis, 1765–1848.* 2 vols. Pp. xxiii, 663. Price, $6.00. Boston: Houghton, Mifflin Company, 1913.

Dr. Morison's account of *The Life and Letters of Harrison Gray Otis* is very readable, and throws many illuminating sidelights upon American history during the first three decades of the constitutional period. The picture of social life in Philadelphia from 1797 to 1801, of the political intrigues at the end of the Federalist period, and of the beginning of the control of the national government by the Republican leaders is especially entertaining and instructive.

Massachusetts' attitude towards the federal government at the time of the attempted enforcement of the embargo act is well presented in volume two, which also contains a valuable account of the Hartford convention, of which Otis had intimate knowledge.

The work closes with an account of Otis' policy as mayor of Boston and an estimate of Otis' career. As the author states "Otis, in truth, belonged more to the eighteenth than to the nineteenth century. He had no ambition for territorial expansion or world power for his country. Since the manifest destiny of the United States has been otherwise, we may say that it was well

that Otis and his friends were swept out of national power at the beginning of the nineteenth century. The personality of Harrison Gray Otis was singularly well-rounded and attractive. In him were blended all the qualities that make up the man beloved by men. Had Otis been inclined to seek from Providence one more boon, it would have been that his countrymen should take him at his word, when he told them that the Hartford convention was intended to save, not to destroy, the Union of the States."

EMORY R. JOHNSON.

University of Pennsylvania.

REEDER, ROBERT P. *The Validity of Rate Regulations, State and Federal.* Pp. xv, 440. Price, $5.00. Philadelphia: T. and J. W. Johnson Company, 1914.

Public service corporations and their rates now form a central problem in our national and state legislation. In the volume before us we have one of the most valuable treatises upon the constitutional aspects of government regulation that have been published in this country. The author has made an exhaustive study of the cases, of textbooks and legal periodicals, and he has gone far afield into political science, sociology and economics for pertinent material. He has apparently given deep thought to the problems of constitutional law and has been able to offer solutions which go to the very heart of some of the most difficult problems. By the excellent arrangement of his material and by the use of a diction of striking simplicity he has stated the results of his labors in the clearest possible manner.

The book is divided into nine chapters, taking up the commerce clause, the distribution of governmental powers among the three departments of government, the due process clauses of the fifth and fourteenth amendments, the equal protection provision, the requirement of just compensation, the impairment of contract clause, preferences to ports, and limitations upon the federal judicial power. Special attention is given to such questions as whether separate intrastate transportation before or after interstate transportation comes within the commerce clause, whether the granting to a public utilities commission of a wide discretion in the establishment of rates is a delegation of legislative power which is forbidden by the constitution and whether in rate cases a public service company is entitled to claim that its property is worth more than the cost of reproducing that property at the present time, less an allowance for the depreciation which has actually taken place. In each case the discussion is an important contribution to constitutional and regulative law.

But the most noteworthy feature of the book is to be found in the two chapters which are devoted to the due process clause of the Constitution. The court "practically regards this provision as authorizing the court to impose upon governmental actions such tests of fitness as the court itself may choose to impose," (p. 130); and the author demonstrates that this position "does not rest upon either history, sound logic or a literal interpretation of the terms of the provision" (p. 130), that the restraint is indefinite and the decisions under it are inconsistent, that for the sake of consistent decisions in the future the position of the court must be reconsidered, and that the court should hold that

the due process provision simply requires the observance of the procedure which is established by the law of the land.

At first glance it may seem that for a book on rate regulation a disproportionate amount of space is given to this discussion of the due process provision. But in view of the frequency with which cases arise under this provision and the confused state of the decisions an elaborate discussion is certainly necessary for adequate treatment.

A feature of the arrangement of the book which especially commends itself is the statement of the law, separately from the discussion of the principles underlying the law. Those who wish to know the decisions on a given point find them clearly stated; those who desire to delve more deeply into fundamental questions of legal policy will find ample discussion of all important problems.

JAMES T. YOUNG.

University of Pennsylvania.

SCOTT, WILLIAM ROBERT. *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720.* Vol. I. *The General Development of the Joint-Stock System to 1720.* Vol. II. *Companies for Foreign Trade, Colonization, Fishing, and Mining.* Vol. III. *Water Supply, Postal, Street-Lighting, Manufacturing, Banking, Finance and Insurance Companies. Also Statements Relating to the Crown Finances.* Pp. lvi, 488; x, 504; xii, 563. Price, $5.00; $5.00; $6.00. New York: G. P. Putnam's Sons, Vol. I, 1912; Vol. II, 1910; Vol. III, 1911.

The increasing attention being given to the study of economic history is evidenced by the publication of these three volumes on the development of *Joint-Stock Companies to 1720.* During the one hundred and fifty years preceding 1720, the joint-stock company organization of business developed in Great Britain and Ireland, and established the business conditions which prevailed, without much change, until the renewed development of corporations began toward the middle of the nineteenth century. Dr. Scott has done his work with great thoroughness and with exceptional discretion in the handling of material, and has produced a work of scholarly value that will probably prove to be a permanent contribution to the literature of history and economics.

Dr. Scott has not attempted to present "the whole life history of the joint-stock system" for the one-hundred-and-fifty-year period. He states that "a complete account of its organization, in its entirety, would have required much more space than that available" in the three volumes, which, however, include an account of "the internal management of companies in relation to their corporate character, the means by which capital was collected and controlled, and the methods by which those who provided it participated in the profits or losses."

Volumes two and three contain part two of the work and present the "constitutional and financial history of *each* of the chief joint-stock companies from 1553 to 1720, with records of the highest and lowest prices of their stocks or shares, the amount of capital and the dividends paid." Volume two deals

with companies for foreign trade, colonization, fishing, and mining, while volume three considers water supply, postal, street lighting, manufacturing, banking, finance and insurance companies, together with systems relating to the Crown finances.

Having thus presented in volumes two and three, which were published before volume one was issued, the facts regarding individual joint-stock companies, Dr. Scott then wrote and published volume one—the account of the "general development of the joint-stock system to 1720."

As the author states: "The first part of the work consists of an attempt to record the beginning and the development of the joint-stock system during the first important stage in its history, namely, till the year 1720. . . . ." "The first part consists of a general introduction, providing a summary of the early years of joint-stock organization."

As the author explains, his method of presentation involved the risk of more or less repetition, but he seems to have avoided any unnecessary or undesirable repeating of material, in spite of the fact that volume one reviews, in a comparative and summary way, the details presented in the second and third volumes. The first volume will be read with interest by many who will not care more than to consult portions of volumes two and three, which may be considered to supplement and amplify volume one; but all students of American colonial history will probably wish to read carefully division two of volume two, which gives the history of the "companies for planting and similar objects," by means of which the first settlements were established in continental America.

EMORY R. JOHNSON.

University of Pennsylvania.

TAYLOR, GRAHAM. *Religion in Social Action.* Pp. xxxv, 279. Price, $1.25. New York: Dodd, Mead and Company, 1913.

For twenty years the author of this work has been an increasingly important factor in the civic and religious life of Chicago. Going there as professor in Chicago Theological Seminary, he settled with his wife and children in one of the poorest quarters of the city and there lived, and still lives, as a neighbor and friend to all comers. Despite the fears of many, his children grew into fine maturity and are doing him honor. His home developed into the settlement known as Chicago Commons, of which he is still warden. His interest in social work resulted in the founding of the Chicago School of Civics and Philanthropy, of which he is president. Through these years he has inspired great numbers of young men and women. If he has ever been discouraged or pessimistic, few know it.

The present volume is, in reality, the expression of his own socio-religious philosophy, as illustrated by his life. Because of this fact it is rather rambling and discussive in style—the author is not describing an outside reality—he is revealing an inner attitude. This marks to the critic, perhaps, the most glaring weakness, but it also indicates the source of its power. The changing conditions which require change in religious methods are clearly stated.

Personality, friendship, family, industry, religion, community indicate

the ground covered. In reality, it is the story of religion made social, a life made serviceable, an ideal made real, that characterizes the book. One who wishes to see if religion can express itself in life rather than in creed will find here convincing evidence. Few volumes better show the call to social service. It is a splendid story for any man or woman, young or old.

Miss Jane Addams contributes an interesting foreword.

CARL KELSEY.

University of Pennsylvania.

WATNEY, CHARLES, and LITTLE, JAMES A. *Industrial Warfare.* Pp. x, 353. Price, $2.00. New York: E. P. Dutton and Company, 1913.

"Despite the universality of interest in the labour movement, there does not appear to exist any epitome which may explain to the ordinary reader the exact significance and the possibilities of the growing unrest" (p. v). The authors have sought to supply this need by this popular volume on English conditions. It deals with the rise of the trade union movement and more recent entrance into politics of the labor groups. It also includes analyses of the Socialistic and Syndicalist movements. The main body of the book deals with the "labor unrest" in the various industries, such as railroading, mining, cotton, engineering, etc. In these chapters the authors discuss the various strikes—"the issues and personalities"—and analyze carefully the results accomplished. Chapter XVIII gives a statement of the suggested remedies from the point of view (1) of the employers, (2) of the workers, (3) of the public. The employers ask to be left alone and to be allowed to work out their own salvation. They distrust governmental and parliamentary action. "The difficulty of approaching any solution from the point of view of the workers is that their opinion is hopelessly divided according to their point of view of capital and capitalism" (p. 244). The authors feel that the great numbers of workers believe in peaceful agreements and desire simply "A fair day's wage for a fair day's work." The public desire peace above all else and continue the hope that the parties in the industrial struggle will develop agreements so that their course may be harmonious.

Although the book warns against the thought that "profit-sharing and copartnership" are the cure for all difficulties, they feel that much good may be accomplished by these means. The most significant step in the last fifty years is the "abandonment of the *laissez-faire* policy of the government in regard to industrial disputes . . . . " (p. 235). The authors think that "in all probability government action will in future take the form of giving legalized sanction to decisions binding organized groups of trades in different districts, in fact, compelling their organization" (p. 237).

The dual authorship is clearly visible and the lack of uniformity between chapters causes a distinct loss. The treatment of the subject is, however, judicial and unbiased. It is surprising to find the name of Mr. Tom Mann mentioned so frequently. He is without doubt one of the spectacular figures in the labor movement, but his influence seems to be over-emphasized. The summary of labor legislation is suggestive, but very incomplete. The entire book is superficial and fails to point out the essentials of the labor attitude.

The authors throughout see personalities and events rather than fundamental and deep-rooted causes.

ALEXANDER FLEISHER.

Philadelphia.

WEBB, SIDNEY and BEATRICE. *English Local Government; The Story of the King's Highway.* Pp. x, 279. Price, $2.50. New York: Longmans, Green and Company, 1913.

This volume is a continuation of the work on English local government begun by Mr. and Mrs. Webb in 1899. It presents aspects of contrast and of similarity with its three predecessors in the series. They dealt with organs of local government during the period from 1688 to 1835. The present is a study of one function of local government, and, in the words of the authors, "we have made it begin with the war-chariot of Boadicea and brought it down to the motor omnibus of today" (p. vii). Like the previous volumes, however, this is based on patient researches in widely scattered sources, and the same still is displayed in marshaling a wealth of illustrative detail in such a way as not to burden or obscure a clear and logical narrative. Copious references to authorities enhance the value of the work to the historical student, but their relegation to appendices following the several chapters renders their study more difficult without in any way aiding the reader who may desire to skip them.

In the apportionment of the narrative the motor omnibus fares somewhat better than the war-chariot. The special investigations of the authors go no further back than the sixteenth century, and the history of road maintenance previous to that time is dismissed with a brief summary of nine pages. The analysis of the road legislation of the Tudors and Stuarts, however, is masterly. By these laws the parish was left responsible for the upkeep of existing highways and the surveyors of highways and the justices of the peace were given ample powers between them to enforce this responsibility. But an excellent account of the working of this system shows that neither the average surveyor nor the average justice took his duties in this connection very seriously. The compulsory labor on the roads required of all parishioners became a farce, highway rates were rarely levied, and, though the parish was criminally liable before quarter sessions for neglect to maintain passable roads, such liability appears to have been only occasionally enforced. The roads could be used only by horsemen and not always by them.

In the seventeenth century a new demand was made on the roads by the beginning of traffic on wheels. Eventually this increased in volume until it revolutionized the methods of making roads and necessitated the creation of new administrative agencies. The story of this slow development, beginning with the attempt to make the new vehicles conform to the existing roads by regulating their size and weight, continuing through the turnpike stage and through the era of transition under Telford and Macadam, and ending with the complete reorganisation of highway administration during the nineteenth century, is graphically and entertainingly told.

But the work of the historians does not end with the nineteenth century,

for the present century has brought its own problems of road maintenance. The authors find that the appearance of the motor car has produced effects on public opinion and on administration parallel to those produced by the advent of new users of the roads three centuries ago. They conclude, therefore, by suggesting the administrative reforms which should be made to meet the new traffic conditions.

W. E. LUNT.

Cornell University.

WINTER, NEVIN O. *The Russian Empire of Today and Yesterday.* Pp. xvii+487. Price, $3.00. Boston: L. C. Page and Company, 1913.

Many books have been written about Russia but few of them give a comprehensive picture that is at once up-to-date and reliable. Russia is so large, her various sections so different, her people so diverse, that misconceptions concerning both the land and the people are easily gained. St. Petersburg is not Russia, neither is Kiev, nor the Jewish Pale. Russian officials and political leaders are not the Russian people. And yet to many, Russia has been represented by some restricted part or by a single element in its enormous population. National, as well as ethnic, unity is still lacking in the Empire of the Czar and Russia is most difficult of interpretation.

This book is descriptive of Russia rather than interpretive. Its purpose, evidently, is to picture the Russia of today in her various aspects and to tell briefly the story of her marvelous expansion. It does not rank as a critical study with such books as Drage's *Russian Affairs* or von Schierbrand's *Russia*, but it does what few other books have done for the English reader, that is, it gives a description of the whole land and people of European Russia as seen by a trained and experienced observer of national affairs.

The first part of the book consists of regional descriptions. After a chapter on Russia as a whole, the various larger divisions are treated, as Great Russia, Little Russia, the Land of the Cossacks, Poland and the Baltic Provinces, and so on. Then follow a series of chapters on social conditions, indicated by some of the chapter titles as follows: noble and Tchinovink, the peasants and their communes, the Jewish Pale and its unfortunates, education, religious forces, etc. A final group of chapters deals with historical and political topics, more especially those of recent date. Here are discussed Nihilism and revolution, autocracy and bureaucracy, the beginnings of representative government, etc. The author's conclusions are based upon his own observations carried on in all parts of European Russia, and his descriptions are not only fresh and vivid, but sane, accurate and unbiased. The book gives just what the general reader wants to know. It is attractively bound, fully illustrated and contains a bibliography and index. Although entitled "The Russian Empire," it does not treat of Siberia nor of the Russian Central Asian provinces.

G. B. ROORBACH.

University of Pennsylvania.

WOODBURN, JAMES ALBERT. *The Life of Thaddeus Stevens.* Pp. 620. Price, $2.50. Indianapolis: Bobbs-Merrill Company, 1913.

The chief aims of this well written and extremely entertaining biography are the vindication of the character of Thaddeus Stevens and the defence of the position he took on the vital political issues with the history of which he was so intimately connected.

Few could read this story of Stevens' life and study his relation to the absorbing problems of his day—the anti-Masonic turmoil, the free-school question, the slavery controversy, the conduct of the Civil War, and the policy of reconstruction—without being convinced that whatever Stevens said or did, his public actions, always straightforward and consistent, were based upon sincere motives. In so far as the justification of his record depends upon the question of his personal convictions as to the correctness of his attitude no one will be inclined to deny that his purposes were honest and his intentions good; and one even forgets the vindictive spirit which often actuated the grim old fighter in admiration for the relentless vigor and uncompromising determination with which he battled for what he thought was a just cause.

However, Professor Woodburn creates the impression that the position taken by Stevens in his political combats was justified not only because Stevens believed he was right, but also because the policies which he advocated were for the most part sound and wholesome. This latter claim may well be subjected to criticism. Probably the most prominent feature of Stevens' political career and certainly the one for which he will be longest remembered was the share he had in the formulation of the reconstruction policy of 1867. This policy, born as it was of a desire for retaliation and vengeance and saturated with a spirit of hatred and embittered partisanship, is now generally recognized to have been a grave blunder, and no testimony as to the self righteousness of its authors is likely to cause a reversal or modification of that judgment.

Professor Woodburn's apology for the greenback movement will find little acceptance. His statement that there was a contraction of the circulating currency from $58 per capita in 1865 to $17 per capita in 1875 is somewhat overdrawn. The short-time interest-bearing notes, which he includes as a part of the volume of currency in 1865, had little circulation, and furthermore they were practically all retired by 1868 without causing much change in monetary conditions. Rapid resumption was of course attended by hardship to many debtors, and it is certain that by the thimble-rigging tactics of the gold speculator the government was defrauded and the people despoiled. Yet it is impossible to see how commercial stability could have been established had not financial adjustment been effected along the lines pursued.

T. W. VAN METRE.

University of Pennsylvania.

YOCUM, A. DUNCAN. *Culture, Discipline and Democracy.* Pp. x, 320. Price, $1.25. Philadelphia: Christopher Sower Company, 1913.

A remarkably sensible book. It presents strong arguments in favor of many common sense views of education which are now in danger of elimination by our progressive educators. For example: Not all that children should learn need be learned in school; time is a necessary factor in learning; nothing can be more fatal to learning than the insistence of some critic upon thoroughness in the sense of complete comprehension. The author's views upon juvenilising all literature ought to brace up some intelligent but timid educators who have long appreciated the condition but lacked the courage to discard the peptonized literary nourishment.

All the author says about specialization and the choice of a vocation is sound. "At each stage of education a limited amount of academic specialization should be compelled, strengthened by vocational motive wherever possible." The former should close with the finishing of formal school work and the latter then begin under ordinary conditions. Continuity is an indispensable condition of discipline. Habit in the sense of discipline must be permanent, and in the sense of general discipline must be dominant. The solution of the problems of education does not depend upon the growth of vocational schools nor upon cultural institutions with their lack of reality, "but lies in the paralleling of general education and specialization, and the relating of each as fully as possible to life."

Culture is the product of the education best for democracy. It has a direct relation to citizenship and vocation. However, there is special culture as there is a variety of vocations. General culture plus the special culture identified with the individual's life work is necessary. Either alone is insufficient. Not only are the two not incompatible, but they are complementary.

Culture, discipline and preparation for life constitute the pedagogical trinity according to Dr. Yocum. It is just the book to recommend to the intelligent, inquiring patron of education, for no discussion of the subject for the year just closed equals this in grasp and sanity.

ALBERT H. YODER.

Whitewater, Wis.

REPORT OF THE BOARD OF DIRECTORS AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE

I. Review of the Academy's Activities

At no time since its organization has the Academy demonstrated so thoroughly as during the course of the year 1913 the importance of the public service to be rendered by an organization such as ours. So many of the political, social and economic beliefs of the American people have been subjected to criticism during the past year that we find public opinion leaving its ancient moorings and anxiously seeking guidance. In this work of adapting our national thought to the new conditions that confront the country the Academy is called upon to play an important part.

The national character of our organization involves heavy responsibilities and in order to meet these responsibilities your officers must call upon an increasing number of our members for more active coöperation in the Academy's work. There is a growing demand for the establishment of Academy centers in different sections of the country, and your Board has given careful thought and consideration to this important question. We realize that the Academy's influence can be extended greatly through the establishment of these centers, but we also are conscious of the fact that the problems involved are of such magnitude that no final step should be taken in this direction until a carefully matured plan has been agreed upon.

In the spring of 1915 the Academy will celebrate the twenty-fifth Anniversary of its founding, and your Board is making the necessary preparations for this event. We cherish the hope that this celebration will furnish the occasion for the realization of two plans, which your Board has kept constantly in mind, namely, an endowment fund adequate to meet the needs of the Academy, and a building which will furnish the necessary facilities for the carrying on of the publication activities and for the holding of Academy sessions.

II. Publications

During the year 1913 the Academy has published a series of volumes which has brought together the best thought of the country on the important problems with which these volumes deal:

January.....Canadian National Problems
March.....Prison Labor
May.....County Government
July .....Cost of Living
September.....The Negro's Progress in Fifty Years
November.....Reducing the Cost of Food Distribution

Your Board desires to take this opportunity to express its obligations to the Editor-in-Chief, to the Assistant Editor, to the Associate Editors, and to the other members of the Publication Board for their unselfish devotion to the publication work of the Academy.

III. MEETINGS

During the year 1913 the Academy has held the following meetings:

January 25.....The Hay-Pauncefote Treaty and Panama Canal Tolls
February 8.....The Enforcement of Law in American Cities
March 14.....The Problems of Police Administration in their Relation to Vice and Crime
April 4–5.....The Cost of Living
November 7.....The Concentration of the Money Power
December 13.....The Aftermath of the Balkan War

IV. MEMBERSHIP

The membership of the Academy on the 31st of December 1913 was 5,641, with a subscription list of 690, making a total of 6,331. Of the 5,641 members, 1,220 are residents of Philadelphia, 4,206 are residents of the United States outside of Philadelphia, and 215 are foreign members. Of the 690 subscribers 4 are from Philadelphia, 616 from the United States outside of Philadelphia, and 70 from foreign countries. Compared with the membership on the 31st of December, 1912, we find that in the Philadelphia membership there is a gain of 16, in the membership in the United States outside of Philadelphia 26, and in the foreign membership a loss of 20, or a gain of 22 in the membership list. In the subscription list there is a gain of 71 in the United States outside of Philadelphia, 8 in the foreign, and 2 in Philadelphia, making a total gain of 103 in membership and subscriptions for the year.

During the year the Academy has lost through death 56 of its members, four of whom were life members:

Foreign

Tristao de Alencar Araripe, Jr.	R. von Bennigsen	Jacques Novicow

Philadelphia

Louis S. Amonson	William A. Ingham	Harry M. Nathanson
George I. Bodine	Andrew J. Jones	L. W. Steinbach
Hunter Brooke	Frank D. LaLanne	W. Henry Sutton
J. P. Duffy	James MacAlister	J. J. Taylor
Henry W. Hall	Edward W. Magill	Mrs. Owen Wister

United States

Arthur L. Adams	J. Howard Hanson	J. R. Planten
*Franklin Allen	*William F. Havemeyer	Charles E. Pugh
James M. Allen	J. L. Hudson	Charles H. Ripley
Silas W. Burt	W. H. Lanius	Henry Schoellkopf
T. L. Chadbourne	Homer Laughlin	Gustav H. Schwab
A. B. Church	Morris Loeb	Pehr Olsson Seffer
*John K. Cowen	E. Oram Lyte	H. G. Squiers
*Edwin S. Cramp	James W. McCarrick	Anson Phelps Stokes
George G. Crocker	J. H. McClelland	C. Edgar Titzel
H. P. Davidson	Frank M. Montgomery	Lester F. Ward
Frederick W. Feldner	M. L. Muhleman	John T. Willets
Daniel G. Gillette	Robert C. Ogden	John F. Winslow
James B. Hammond	Marlin E. Olmsted	

*Life members.

The death of these members has deprived the Academy of some very warm friends and enthusiastic workers.

During the year the Academy has lost by resignation 813 of its members and 19 subscribers, but this loss has been counterbalanced by the addition to our membership roll of 835 members and 100 subscribers. Of the 835 members, two were entered as life members. Five annual members were transferred to the Life Membership Roll, making a total of 7 life members during the year.

V. FINANCIAL CONDITION

The receipts and expenditures of the Academy for the fiscal year just ended are set forth clearly in the Treasurer's report. The accounts were submitted to Messrs. E. P. Moxey and Company for audit and a copy of their statement is appended herewith.

In order to lighten the burden of expense incident to the Annual Meeting a special fund amounting to $1,325.00 was raised. The Board takes this opportunity to express its gratitude to the contributors to this fund.

VI. CONCLUSION

Your Board desires to take this opportunity to thank those members of the Academy in all sections of the country who throughout the year have contributed toward strengthening our work, both through their advice and suggestions and through contributions to the special volumes.

The auditor's report is appended.

PHILADELPHIA, PA., January 9, 1914.

MR. STUART WOOD

Treasurer, American Academy of Political and Social Science
Philadelphia.

DEAR SIR: We herewith report that we have audited the books and accounts of the American Academy of Political and Social Science for its fiscal year ended December 31, 1913. As a result of our audit and examination we certify that the statements submitted herewith are true and correct.

Yours respectfully

EDWARD P. MOXEY & Co.

Balance, Cash on Hand, January 1, 1913			$3,416.48
RECEIPTS			
Annual Subscriptions		$24,268.92	
Life Memberships		700.00	
Special Contributions		1,376.00	
Subscriptions to Publications		3,209.23	
Sales of Publications		3,040.53	
Income from Investments		3,245.00	
Interest on Deposits		97.64	
Miscellaneous Receipts		9.50	
			35,946.82
			$39,363.30
DISBURSEMENTS			
Office Expense:			
Office Salaries	$8,152.20		
Special Clerical Service	78.70		
Supplies and Repairs	91.64		
Stationery	1,048.94		
Telephone and Telegraph	90.82		
Postage	864.27		
Freight, Express and Car Fares	52.44		
		$10,379.01	
Philadelphia Meetings:			
Hall Rents	$ 376.00		
Stationery, Engraving and Printing	1,074.60		
Clerical Services	107.26		
Expenses of Speakers	913.24		
Forward	$2,471.10	$10,379.01	$39,363.30

Philadelphia Meetings (Cont'd)			
Brought Forward	$2,471.10	$10,379.01	$39,363.30
Postage	222.16		
Telephone and Telegraph	20.73		
Car Fare, Newspapers and Sundries	28.80		
		2,742.79	
Publicity Expense:			
Pamphlets, Cards, Letters, Circulars and Advertising	$295.38		
Postage	874.50		
Stationery	573.25		
		1,743.13	
Publication of Annals:			
Printing	$9,878.75		
Reprints	941.44		
Binding	197.25		
Postage	771.17		
Advertising	64.00		
Stationery	341.07		
Car Fare, Expressage and Sundries	188.79		
Telephone and Telegraph	19.39		
Storage and Insurance	106.80		
		12,508.66	
Investments Purchased	$8,342.50		
Interest, Premiums and Commissions on above	123.66		
		8,466.16	
			$35,839.75
Balance December 31, 1913			$3,523.55

ASSETS

Investments

$3,000	St. Louis & Merchants Bridge Co. (1st Mtg. 6's—1929)	$3,000.00
3,000	Penna. & New York Canal & R. R. Co. (4½'s—1939)	3,000.00
5,000	Wm. Cramp & Sons Ship & Eng. Bldg. Co. (5's—1929)	5,000.00
5,000	West Chester Lighting Co. (1st Mtg. 5's—1950)	5,000.00
3,000	St. Louis Iron Mt. & Southern Ry. (General Mtg. 5's—1931)	3,000.00
3,500	Mortgage (6%)	3,500.00
3,000	Pittsburgh, Bessemer & Lake Erie (1st Mtg. 5's—1947)	3,000.00
5,000	Lake Shore & Michigan Southern Ry. Co. (Deb. 4's—1928)	4,801.25
3,000	Market Street Elevated Pass'r Ry. Co. (1st Mtg. 4's—1955)	2,786.25
5,000	Choctaw, Oklahoma & Gulf R. R. Co. (Gen'l. 5's—1919)	5,000.00
	Forward	$38,087.50

	Brought Forward	$38,087.50
$5,000	New York Central & Hudson River R. R. (Deb. 4's—1934)	4,640.00
5,000	Baldwin Locomotive Co. (Sinking Fund 5's—1934)	4,975.00
5,000	Lehigh Coal & Navigation Co. (Collateral Trust 4½'s—1930)	5,000.00
5,000	New York and Erie Railway (2d Mtg. 5's—1919)	5,000.00
5,000	City of Macon, Ga. (4½'s—1932)	5,000.00
5,000	Lehigh Valley Transit Co. (1st Mtg. 4's—1935)	4,387.50
4,000	New York and Erie Railway (3d Mtg. 4½'s—1923)	3,955.00
	Cash in Bank	3,523.55
		$74,568.55

LIABILITIES

None.

INDEX